2009

No. 09-_____

IN THE
Supreme Court of the United States

AMERICAN FARM BUREAU FEDERATION,
AMERICAN FOREST & PAPER ASSOCIATION, AND
NATIONAL COTTON COUNCIL,
Petitioners,

v.

BAYKEEPER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

ELLEN STEEN
Counsel of Record
CLIFTON S. ELGARTEN
JESSICA A. HALL
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
(202) 624-2500

Counsel for Petitioners

Of Counsel

Julie Anna Potts
American Farm Bureau Federation
600 Maryland Ave., SW
Suite 1000W
Washington, DC 20024

William R. Murray
American Forest & Paper Association
1111 - 19th Street, NW
Suite 800
Washington, DC 20036

William A. Gillon
Gillon & Associates, PLLC
1163 Halle Park Circle
Collierville, TN 38017

QUESTIONS PRESENTED

1. Did the Sixth Circuit err in holding that the "plain language" of the Clean Water Act precludes an EPA rule, consistent with 35 years of agency practice, that the application of a useful pesticide for its intended purpose and in accordance with relevant requirements of EPA's pesticide regulatory program is not a "discharge of a pollutant"?

2. In reviewing an agency regulation under *Chevron*, may a court reject the agency's interpretation by declaring a "plain meaning" that departs from the common understanding of the controlling statutory provisions, without considering statutory context, the simultaneous enactment of a different statute more specifically addressing the subject matter, or the agency's contemporaneous interpretation, all of which support the agency's interpretation?

PARTIES TO THE PROCEEDING

Respondents are:

Environmental petitioners before the Sixth Circuit: Baykeeper; Californians for Alternatives to Toxics; California Sportfishing Protection Alliance; Environment Maine; National Center for Conservation Science and Policy; Oregon Wild; Peconic Baykeeper, Inc.; Saint John's Organic Farm; Soundkeeper, Inc.; Toxics Action Center; and Waterkeeper Alliance, Inc.;

Environmental Protection Agency, respondent before the Sixth Circuit; and

Industry petitioners before the Sixth Circuit: Agribusiness Association of Iowa; Bayer CropScience, LP; BASF Corporation; CropLife America; Delta Council; Eldon C. Stutsman, Inc.; FMC Corporation; Illinois Fertilizer & Chemical Association; and Responsible Industry for a Sound Environment; Southern Crop Production Association; and Syngenta Crop Protection, Inc.

RULE 29.6 STATEMENT

American Farm Bureau has no parent corporation and no publicly held corporation owns 10% or more of its stock.

American Forest & Paper Association has no parent corporation and no publicly held corporation owns 10% or more of its stock.

National Cotton Council of America has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. Statutory Background 2

B. Litigation Leading To The Rule 6

C. The Rule And Its Rationale 8

D. The Decision Below 10

E. Epa's Response To The Decision 12

REASONS FOR GRANTING THE WRIT 13

I. THE BROAD REACH AND HARMFUL IMPACT OF THE SIXTH CIRCUIT'S DECISION MAKE THIS A CASE OF EXCEPTIONAL IMPORTANCE 14

A. The Decision Overturns Three Decades of EPA Practice and Will Dramatically Expand the Scope of the NPDES Program 15

TABLE OF CONTENTS
Continued

Page

B. The Decision Threatens Essential Activities That Protect Our Nation's Public Health and Food Supply.....17

II. THE DECISION BELOW TRAMPLES SETTLED PRINCIPLES OF JUDICIAL REVIEW AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.....20

A. The Sixth Circuit's Reading of "Chemical Wastes" and "From a Point Source" Overrides the Common Meaning of Those Terms. 20

B. The Decision Contravenes This Court's Precedents by Disregarding Statutory Context and History That Support the EPA Rule. 25

C. The Sixth Circuit's Reading of "Biological Materials" Disregards Statutory Context and Conflicts With Decisions of This Court and the Ninth Circuit. 35

CONCLUSION.....37

TABLE OF CONTENTS
Continued

Page

APPENDICES:

A. *National Cotton Council of America, et al. v. United States Environmental Protection Agency*, Nos. 06-4630, 07-3182, 07-3185, 07-3183, 07-3186, 07-8184, 07-3187 (6th Cir. Jan. 7, 2009) 1a

B. *National Cotton Council of America, et al. v. United States Environmental Protection Agency*, Nos. 06-4630, 07-3182, 07-3185, 07-3183, 07-3186, 07-8184, 07-3187 (6th Cir. Aug. 3, 2009) 29a

C. Relevant Statutory and Regulatory Provisions 31a

Clean Water Act § 101(a)(1), (d); 33 U.S.C. §§ 1251(a)(1), (d) 31a

Clean Water Act § 104(l)(1), (2), and (p); 33 U.S.C. § 1254(l)(1), (2), and (p) 32a

Clean Water Act § 208(b); 33 U.S.C. § 1288(b) 33a

Clean Water Act § 301(a), (b), and (e); 33 U.S.C. § 1311(a), (b), and (e) 40a

TABLE OF CONTENTS
Continued

Page

Clean Water Act § 303(c), (d), and (e); 33 U.S.C. § 1313(c), (d), and (e) 45a

Clean Water Act § 306(a)(1) and (2); 33 U.S.C. § 1316(a)(1) and (2) 54a

Clean Water Act § 309(b) and (d); 33 U.S.C. § 1319(b) and (d) 55a

Clean Water Act § 319(a)(1)(A), (B), and (C); 33 U.S.C. § 1329(a)(1)(A), (B), and (C) 56a

Clean Water Act § 402(a) and (b); 33 U.S.C. § 1342(a) and (b) 58a

Clean Water Act § 501(a); 33 U.S.C. § 1361(a) 61a

Clean Water Act § 502(6), (11), (12), and (14); 33 U.S.C. § 1362(6), (11), (12), and (14) 61a

Clean Water Act § 505(a), (f), and (g); 33 U.S.C. § 1365(a), (f), and (g) 63a

Federal Insecticide, Fungicide, and Rodenticide Act § 2(bb); 7 U.S.C. § 136(bb) 65a

TABLE OF CONTENTS
Continued

Page

Federal Insecticide, Fungicide, and Rodenticide Act § 3(c)(5); 7 U.S.C. § 136a(c)(5) 66a

Federal Insecticide, Fungicide, and Rodenticide Act § 12(a)(2)(G); 7 U.S.C. § 136j(a)(2)(G) 67a

Final Rule: Application of Pesticides to Waters of the United States in Compliance With FIFRA 68a

D. Respondent United States Environmental Protection Agency's Motion For Stay Of Mandate 112a

E. Respondent United States Environmental Protection Agency's Reply Brief In Support Of Motion For Stay Of Mandate 179a

F. Declaration of Don Parrish 191a

TABLE OF AUTHORITIES

Page

Cases

Altman v. Town of Amherst, N.Y.,
47 Fed. Appx. 62 (2d Cir. 2002) 8

Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.,
299 F.3d 1007 (9th Cir. 2002) 36

Brown v. Gardner, 513 U.S. 115 (1994) 28

Burlington N. & Santa Fe Ry. Co. v. United States,
129 S. Ct. 1870 (2009) 25

Chevron v. Natural Res. Def. Ctr.,
467 U.S. 837 (1984) ..... passim

Coeur Alaska, Inc. v. Se. Alaska Conservation Council,
129 S. Ct. 2458 (2009) 3, 13

Ctr. for Native Ecosystems v. Cables,
509 F.3d 1310 (10th Cir. 2007) 4

Davis v. United States,
495 U.S. 472 (1990) 34

Entergy Corp. v. Riverkeeper, Inc.,
129 S.Ct. 1498 (2009) 22, 26

Fairhurst v. Hagener,
422 F.3d 1146 (9th Cir. 2005) 7, 10

Food & Drug Admin. v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 27, 30, 32

TABLE OF AUTHORITIES
Continued

Page

Guardians Ass'n v. Civil Serv. Comm'n of the City of New York,
463 U.S. 582 (1983) 34

Headwaters, Inc. v. Talent Irrigation Dist.,
243 F.3d 526 (9th Cir. 2001) 7

League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Forsgren,
309 F.3d 1181 (9th Cir. 2002) 7

Miccosukee Tribe of Indians v. Fla. Water Mgmt. Dist.,
280 F.3d 1364 (11th Cir. 2002),
vacated, 541 U.S. 95 (2004) 23

Nat'l Ass'n of Home Builders v. Defenders of Wildlife,
551 U.S. 644 (2007) 27

No Spray Coal., Inc. v. City of New York,
351 F.3d 602 (2d Cir. 2003) 8

Thomas v. Jackson,
581 F.3d 658 (8th Cir. 2009) 4

Train v. Colo. Pub. Interest Research Group,
426 U.S. 1 (1976) 36

United States v. Am. Trucking Ass'n,
310 U.S. 534 (1940) 36

Waterkeeper Alliance, Inc. v. Envtl. Prot. Agency,
399 F.3d 486 (2d Cir. 2005) 19

Whitman v. Am. Trucking Ass'n,
531 U.S. 457 (2001) 31

TABLE OF AUTHORITIES
Continued

Page

Zuni Pub. School Dist. No. 80 v. Dep't of Educ.,
550 U.S. 81 (2007) 28

Statutes

28 U.S.C. § 1254(1) 1

CLEAN WATER ACT, 33 U.S.C. §§ 1257-1387 .... passim

CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1) 3, 31

CWA § 101(d), 33 U.S.C. § 1251(d) 3

CWA § 104(l)(1)-(2),
33 U.S.C. § 1254(l)(1)-(2) 5, 29

CWA § 104(p), 33 U.S.C. § 1254(p) 5, 29

CWA § 208(b), 33 U.S.C. § 1288(b) 5

CWA § 208(b)(F), 33 U.S.C. § 1288(b)(F) 4, 5, 29

CWA § 301(a), 33 U.S.C. § 1311(a) 2

CWA § 301(b)(1)(C),
33 U.S.C. § 1311(b)(1)(C) 4

CWA § 301(b)(2)(A),
33 U.S.C. § 1311(b)(2)(A) 3

CWA § 301(c), 33 U.S.C. § 1311(c) 3

CWA § 303, 33 U.S.C. § 1313 4

CWA § 303(c)-(e), 33 U.S.C. § 1313(c)-(e) 5

CWA § 309(b), 33 U.S.C. § 1319(b) 4

CWA § 309(d), 33 U.S.C. § 1319(d) 4

CWA § 402(a)-(b), 33 U.S.C. § 1342(a)-(b) 3

CWA § 501(a), 33 U.S.C. § 1361(a) 3

TABLE OF AUTHORITIES
Continued

Page

CWA § 502(6), 33 U.S.C. § 1362(6) 2, 30

CWA § 502(11), 33 U.S.C. § 1362(11) 3

CWA § 502(12), 33 U.S.C. § 1362(12) 2

CWA § 502(14), 33 U.S.C. § 1362(14) 4

CWA § 505(a), 33 U.S.C. § 1365(a) 4

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT, 7 U.S.C. §§ 136-136y ..... passim

FIFRA § 2(bb), 7 U.S.C. § 136(bb) 33

FIFRA § 3(c)(5), 7 U.S.C. § 136a(c)(5) 6, 33

FIFRA § 12, 7 U.S.C. § 136(j) 32

FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G) 6

Regulations

40 C.F.R. § 19.4 (2009) 4, 6

40 C.F.R. § 122.28 (2009) 12

Other Authorities

Pub. L. 92-500, § 309(d), 68 Stat. 860 (1972) 4

Pub. L. No. 92-516, 86 Stat. 973 (1972) 5, 6, 32

S. Rep. No. 92-414, *as reprinted in* 1972 U.S.C.C.A.N 3668 ..... 29, 30

S. Rep. No. 92-838 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3993 ..... 6, 32

68 Fed. Reg. 48,385 (Aug. 13, 2003) 8

70 Fed. Reg. 5,093 (Feb. 1, 2005) 8

TABLE OF AUTHORITIES
Continued

Page

71 Fed. Reg. 68,483 (Nov. 27, 2006) 8

73 Fed. Reg. 33,697 (June 13, 2008) 23

Backlog Reduction, NPDES Program Basics, *available at* http://cfpub.epa.gov/npdes/permitissuance/backlog.cfm 19

Mosquito-Borne Diseases, American Mosquito Control Association, *available at* http://www.mosquito.org/mosquito-information/mosquito-borne.aspx 17

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The court of appeals' opinion is reported at 553 F.3d 927. App., *infra*, 1a.

JURISDICTION

The court of appeals filed its opinion on January 7, 2009, and denied petitioners' timely filed petition for rehearing and rehearing en banc on August 3, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Clean Water Act, 33 U.S.C. §§ 1257-1387, are set forth in the Appendix, *infra*, at 31a-64a.

STATEMENT OF THE CASE

This petition arises from the Sixth Circuit's reversal of more than three decades of United States Environmental Protection Agency ("EPA") practice and policy in administering the Clean Water Act ("CWA" or "the Act"). Since Congress enacted the CWA in 1972, EPA has never subjected the use of pesticides in, over, or near waters to CWA National Pollutant Discharge Elimination System ("NPDES") permitting. A series of citizen lawsuits beginning in the late 1990s generated several Ninth Circuit decisions that created confusion and concern among pesticide users regarding the interpretation of the CWA with regard to pesticide use. In response, EPA issued guidance and ultimately undertook

rulemaking to clarify and formalize the agency's interpretation. The resulting regulation (the "Rule") clearly defines specific circumstances in which the use of pesticides in accordance with all relevant requirements under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") is not a CWA "discharge of a pollutant," explaining in detail the rationale for the agency's interpretation.

Environmental groups, as well as farm and pesticide industry groups, filed petitions for review of the Rule in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits. The petitions were consolidated in the Sixth Circuit, which held that the CWA precludes EPA's interpretation. The court reached this conclusion based solely on the "plain meaning" of the provisions at issue and the statute's general policy goals – which do not specifically address pesticides – and without regard to statutory and historic context that show Congress's clearly expressed intent not to regulate pesticide use under the CWA. The result, absent review by this Court, will be the most sweeping expansion in the history of this important regulatory program.

A. Statutory Background

Section 301(a) of the CWA prohibits the "discharge of a pollutant" by any person except in compliance with certain enumerated provisions. 33 U.S.C. § 1311(a), App. 40a. The Act defines "discharge of a pollutant" to mean the "addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12), App. 62a. It defines "pollutant" to mean several specifically listed categories of materials, including "chemical wastes" and "biological materials." *Id.* § 1362(6), App. 61a-

62a. EPA is charged with the general administration of the Act and is authorized to "prescribe such regulations as are necessary to carry out [its] functions under [the Act]." *Id.* §§ 1251(d), 1361(a), App. 31a, 61a.

A central goal of the CWA is the elimination of all point source "discharges" of pollutants into navigable waters. *See id.* §§ 1251(a)(1) (establishing "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985"), App. 31a; 1311(a) (discharge prohibition), App. 40a; 1342 (establishing the National Pollutant Discharge Elimination System), App. 58a-60a. Under the NPDES program, however, EPA or an authorized State agency may, after public notice and an opportunity for public hearing, issue a permit for the "discharge of a pollutant" if certain terms and conditions are met.[1] *Id.* § 1342(a)-(b), App. 58a-60a.

NPDES permits must include "effluent limitations" to restrict the "quantities, rates, and concentrations" of constituents in the effluent discharge.[2] *Id.* §§ 1362(11), App. 62a; 1311(e), App.

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[1] Discharges of "dredged or fill material" are addressed under a separate program pursuant to CWA Section 404, administered by the U.S. Army Corps of Engineers. *See Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2463 (2009).

[2] The standard that governs effluent limitations for most pollutants is set forth at Section 301(b)(2)(A), which requires "the best available technology economically achievable ...[which] shall require the elimination of discharges of all pollutants if the [EPA] finds ... that such elimination is economically achievable ...." 33 U.S.C. § 1311(b)(2)(A), App. 41a-42a.

45a. In addition to technology-based limits, the permit must impose any more stringent limits "necessary to meet water quality standards." *Id.* § 1311(b)(1)(C), App. 41a. The maximum civil penalty for any unauthorized pollutant discharge or violation of permit conditions is $37,500 per violation, per day.[3] *See id.* § 1319(d), App. 55a; 40 C.F.R. § 19.4 (2009). Violations may be enforced by EPA or any interested citizen. *See id.* §§ 1319(b), 1365(a), App. 55a, 63a.

Not all sources of water pollution are regulated under the CWA. Sources not defined as a "discharge of a pollutant" but that nevertheless affect water quality are broadly categorized as "nonpoint sources."[4] Nonpoint sources are addressed through a variety of non-regulatory, mostly State-controlled programs. The CWA water quality standards program, for example, broadly applies to all sources of water pollution, whether or not they are subject to NPDES permits. *See id.* § 1313. Under that program, States establish water quality goals, identify waters where those goals are not being attained, and establish a "continuing planning

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[3] The original maximum civil penalty was $10,000. *See* Pub. L. 92-500, § 309(d), 68 Stat. 860 (1972).

[4] The term "nonpoint source" is not defined in the CWA, but generally encompasses every source of water pollution that is not a regulated point source discharge. *See Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1331 (10th Cir. 2007); *Thomas v. Jackson*, 581 F.3d 658, 661 n.4 (8th Cir. 2009). Agricultural activities in particular have traditionally been viewed as nonpoint sources and have been targeted by Congress for specific exclusions from "point source" regulation. *See* 33 U.S.C. §§ 1288(b)(F), 1362(14), App. 62a.

process," subject to EPA approval, applicable to all navigable waters. *Id.* § 1313(c), (d), (e), App. 45a-54a.

The Section 208 program also addresses nonpoint sources, calling for area-wide waste treatment management plans developed by state or local entities. *Id.* § 1288(b), App. 33a-40a. Such plans must be applicable to "all wastes generated within the area involved," including control of "agriculturally and silviculturally related nonpoint sources" *Id.* § 1288(b)(F), App. 36a. In addition, CWA Section 104(p) requires "a comprehensive study and research program to determine new and improved methods ... of preventing, reducing, and eliminating pollution from agriculture." *Id.* § 1254(p), App. 33a.

Section 104(l) is (and was in 1972) the only CWA provision that refers to the water quality impact of pesticides. That provision required: (1) that EPA develop and issue by 1973 information on the effects of pesticides in water, and (2) that the President investigate the "methods to control the release of pesticides into the environment [including] examination of the persistency of pesticides in the water environment and alternatives thereto." *Id.* § 1254(l)(1)-(2), App. 32a-33a. The Act directed the President to report to Congress on his investigations "together with his recommendations for any necessary legislation." *Id.* § 1254(l)(2), App. 32a-33a.

Three days after Congress enacted the CWA, it passed comprehensive amendments to FIFRA, the statute that regulates the sale, distribution, and use of pesticides. *See* 7 U.S.C. §§ 136-136y; Pub. L. No. 92-516, 86 Stat. 973 (1972). Recognizing that pesticides "have important environmental effects,

both beneficial and deleterious," Congress found that "wise control based on a *careful balancing of benefit versus risk* to determine what is best for man is essential." S. Rep. No. 92-838, at 4 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3993, 3996 (emphasis added). Accordingly, in the 1972 FIFRA amendments, Congress created a scheme in which EPA would assess the adverse environmental effects of registered pesticides and approve label restrictions to ensure that pesticide use would not cause "unreasonable adverse effects on the environment."[5] *See* 7 U.S.C. § 136j(a)(2)(G). 136a(c)(5), App. 67a, 66a.

To regulate pesticide application by end users such as farmers or commercial applicators, the FIFRA amendments prohibited the use of a registered pesticide "in a manner inconsistent with its labeling." *See id.* § 136j(a)(2)(G), App. 67a. Any such use was made subject to maximum civil penalties of $5,000 (now $7,500) for commercial applicators, or $1,000 (now $1,100) for private applicators. Pub. L. No. 92-516, § 14(a)(1)-(2), 86 Stat. 992-93 (1972); 40 C.F.R. § 19.4 (2009).

B. Litigation Leading to the Rule

Allegations that pesticide use should be regulated as a CWA "pollutant" discharge were first asserted in a series of citizen enforcement suits in the Ninth and Second Circuits in the late 1990s. *See*

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[5] Congress also broadened FIFRA's previous registration requirement, so that all pesticides sold or distributed in any State, with certain narrow exclusions, must be registered. *See* S. Rep. No. 92-838, at 1 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3993, 3994.

App. 75a-77a. These lawsuits generated several appellate decisions before EPA initiated the rulemaking at issue here.

In *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 532-33 (9th Cir. 2001), the Ninth Circuit held that an unlawful discharge occurred where the defendant had applied a pesticide to an irrigation canal, and treated water leaked through a "waste gate" into a natural, fish-bearing stream (contrary to pesticide label instructions), reasoning that residual pesticide remaining after application is a "chemical waste" and therefore a "pollutant." *Id.* at 528, 530, 532-33. In *League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1183-85 (9th Cir. 2002), the Ninth Circuit held that aerial spraying of pesticide to a forest canopy directly over streams was a "discharge of a pollutant" requiring an NPDES permit.[6] By contrast, in *Fairhurst v. Hagener*, 422 F.3d 1146 (9th Cir. 2005), the Ninth Circuit found no CWA pollutant discharge and no NPDES permit requirement where aquatic pesticides were applied in compliance with FIFRA requirements, left no residue, and had no "unintended effects." *Id.* at 1151.

The litigation also generated two Second Circuit decisions that did not reach the merits of the question addressed in the Rule, but that suggested a

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[6] The Ninth Circuit mistakenly assumed that the defendant U.S. Forest Service did not dispute that the pesticide was a CWA "pollutant." *See* 309 F.3d at 1184 n.2; App. 75a. Thus, the court's analysis focused entirely on whether aerial spray equipment used in forest pest control is a "point source." *Id.* at 1185

need for EPA's interpretive guidance. In *Altman v. Town of Amherst, N.Y.*, 47 Fed. Appx. 62, 66 (2d Cir. 2002), the Second Circuit vacated the dismissal of a suit challenging mosquito-control spraying in a wetland area, finding that the lower court should have allowed further discovery on the circumstances of the application.[7] And in *No Spray Coalition, Inc. v. City of New York*, 351 F.3d 602, 605-06 (2d Cir. 2003), the court vacated a district court ruling that the CWA citizen suit provision is inapplicable to claims involving pesticide use in substantial compliance with FIFRA, but did not address the "complex question" of whether such pesticide use is a CWA discharge of a pollutant. *Id.* at 606.

C. The Rule and Its Rationale

As the litigation continued, concern and confusion grew among farmers, forest landowners, and public health officials, prompting EPA to issue guidance and ultimately undertake rulemaking to clarify its interpretation of the CWA as applied to pesticide use. The final Rule, 71 Fed. Reg. 68,483-68,492 (Nov. 27, 2006), is the culmination of a three-year participatory rulemaking process that began with an interim interpretive statement in 2003 and involved two rounds of public comment. *See id.*, App. 68a-111a; 68 Fed. Reg. 48,385-48,388 (Aug. 13, 2003); 70 Fed. Reg. 5,093-5,100 (Feb. 1, 2005) (final interpretive statement and notice of proposed rulemaking).

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[7] The court noted that, "[u]ntil the EPA articulates a clear interpretation of current law ... the question of whether properly used pesticides can become pollutants that violate the CWA will remain open." *Id.* at 67.

The Rule broadened the reach of the CWA relative to EPA's historic practice of *never* subjecting pesticide use to CWA regulation. Under EPA's formal interpretation, the application of pesticides may be deemed a CWA pollutant discharge if the application is not in accordance with all relevant FIFRA requirements. However, the Rule provides that pesticide use in compliance with FIFRA requirements is not a "discharge of a pollutant" in two circumstances: (1) application directly to waters, and (2) application to control pests that may be present over waters, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters in order to target the pests effectively. App. 110a-111a.

EPA reasoned that the use of chemical pesticides under the circumstances set forth in the Rule is not the discharge of a "pollutant." *Id.* 82a. Such pesticides are not "chemical wastes," but products being used for their intended purpose. *Id.* EPA further found it unlikely that Congress intended to categorize biological pesticides differently than chemical pesticides, particularly given that biological pesticides were uncommon when the CWA definition was enacted and that modern biological pesticides are typically "reduced-risk products." *Id.* 83a. For this reason, EPA concluded that interpreting "biological materials" to include biological pesticide applications would be inconsistent with the purposes of the statute. *Id.*

EPA concluded that excess or residual pesticides remaining after pesticide use are "pollutants," but that the application *itself* is not a "discharge of a pollutant" because there is no "pollutant" at the time of the application. *Id.* 86a (application in such

circumstances would "not meet both statutory prerequisites (pollutant and point source) at the time of its discharge into the water"). Thus, EPA concluded that excess or residual pesticide present in waters as a result of pesticide use in accordance with the Rule is nonpoint source pollution to be addressed through CWA and State programs other than the NPDES permitting program.[8] *Id.* 87a.

D. The Decision Below

The Rule was challenged in eleven courts of appeals and consolidated in the Sixth Circuit, which vacated the Rule as contrary to the plain language of the CWA.[9] App. 2a. The court agreed with EPA that the common meaning of "chemical waste" is "discarded," "superfluous," or "excess" chemical, but ruled that any useful chemical containing portions that *will become* waste must itself be regulated under the CWA as a "chemical waste." *Id.* 18a-19a. Pointing to the Ninth Circuit's decision in *Fairhurst*, the court concluded that all chemical pesticides must be regulated as "chemical wastes" unless they are intentionally applied to waters and will leave no

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[8] EPA explained that where pesticide residues are discharged "from a point source" – such as in industrial wastewater discharges or regulated stormwater discharges from municipal or industrial sources – such point source discharges are subject to NPDES permit requirements. App. 85a.

[9] Industry and farm petitioners challenged EPA's interpretation that noncompliance with relevant FIFRA requirements may cause pesticide use to be deemed a CWA pollutant discharge. Petitioners are not seeking review of the denial of those claims.

excess or residual after performing their intended purpose. *Id.* 18a.

With regard to biological pesticides, the Sixth Circuit found that the plain language of the CWA requires that "matter of a biological nature, such as biological pesticides" be deemed a pollutant. *Id.* 21a. Thus, *any* biological pesticide, regardless of whether it will leave any excess or residual after performing its function, must be deemed a CWA "pollutant." The court rejected EPA's conclusion that Congress should not be presumed to have intended different treatment for chemical and biological pesticides. *Id.* 22a. Instead, the Sixth Circuit concluded that "if we are to give meaning to the word 'waste' in 'chemical waste,' we must recognize Congress's intent to treat biological and chemical pesticides differently." *Id.*

The Sixth Circuit also concluded that "pesticide residue or excess pesticide – even if treated as distinct from pesticide – is discharged from a point source." *Id.* 26a. The court ruled that the CWA phrase "*from* a point source" can only mean "*by* a point source." *Id.* 26a-27a. Further, pollutants are discharged "by" a point source whenever the point source is a "but for" cause of the addition of pollutants to navigable waters; the substance need not be a "pollutant" *at the time* it comes "from" the point source. *Id.*

Accordingly, the court vacated the Rule, concluding that "dischargers of pesticide pollutants are subject to the NPDES permitting program." *Id.* 27a-28a.

E. EPA's Response to the Decision

Although EPA vigorously defended the Rule before the Sixth Circuit, it has acquiesced to the court's decision under a new Administration. The United States did not seek rehearing and, instead took the position that further review was not warranted because EPA and the NPDES-authorized state agencies can manage permitting for pesticide use through the device of "general permits" authorized under EPA rules. *See* App. 116a-117a; 40 C.F.R. § 122.28 (2009).

EPA has not, however, disavowed the policy and legal determinations made in the Rule. Moreover, the agency has acknowledged the dramatic change and threat of substantial harm that the Sixth Circuit's ruling will produce. Indeed, EPA has argued that the unavailability of permits would cause "serious disruption of public health initiatives, agriculture and other activities." App. 128a. EPA also described the substantial administrative burdens and resource demands associated with general permit issuance, while also highlighting the severe ($700,000,000 to $1 billion) budget shortfall already faced by State NPDES permitting agencies. *Id.* 142a, 147a-161a. EPA successfully urged the Sixth Circuit to stay its mandate to allow *two years* for EPA and the 46 authorized State agencies to attempt to develop "general permits" to authorize at least some of the estimated *5.6 million* pesticide applications annually that will now need permit coverage. *See* App. 124a, 131a.

REASONS FOR GRANTING THE WRIT

Left undisturbed, the decision of the Sixth Circuit will overturn more than three decades of EPA practice and bring about the greatest expansion of the NPDES program since the CWA was enacted in 1972. It will sweep into that program an estimated 5.6 million pesticide applications annually. The affected pesticide users include local governments that apply pesticides to control mosquitoes to protect public health, farmers who use pesticides to save crops, foresters who use pesticides to protect timber, and even federal entities like the U.S. Coast Guard and U.S. Department of Agriculture ("USDA"). App. 115a, 129a. Few decisions in the history of the CWA have had such a far-reaching and disruptive impact. The decision thus has dramatic implications for the administration of an important federal regulatory program and for our nation's health and welfare.

The Sixth Circuit found that the CWA *unambiguously* requires the regulation of pesticide use as a "pollutant" discharge. To reach this result, the court flouted the teachings of this Court in *Chevron v. Natural Resources Defense Center*, 467 U.S. 837 (1984), and dozens of subsequent decisions up through *Coeur Alaska*, 129 S. Ct. at 2463, this past Term. The court preemptively substituted its own "plain" reading of the governing statutory provisions in place of EPA's patently reasonable interpretation. Then, having declared the text of the governing provisions "plain," the court looked no further, ignoring statutory and historic context that make quite clear Congress's decision *not* to require CWA permitting for pesticide use.

The Court should grant the petition to restore EPA's reasonable interpretation of this complex statutory scheme and maintain the proper scope of this important federal regulatory program. Absent review in this case, there will be no further opportunity for review before CWA liability and permitting requirements are imposed on virtually all pesticide use in, over, or near waters. Review should also be granted to reinforce this Court's requirement of a meaningful inquiry into Congress's expressed intent as a prerequisite to invalidating an agency rule. There is room enough for error when courts employ the "traditional tools" of statutory construction to discern the meaning of Congress's words. When courts ignore those tools, the process of judicial review loses integrity and both agencies and the regulated public are left at the whim of judicial policy-making.

I. THE BROAD REACH AND HARMFUL IMPACT OF THE SIXTH CIRCUIT'S DECISION MAKE THIS A CASE OF EXCEPTIONAL IMPORTANCE.

Under the Sixth Circuit's decision, hundreds of thousands of individuals, businesses, and government entities will, for the first time, be prohibited from using pesticides in, over, or near waters unless they obtain authorization to do so under an NPDES permit. The newly regulated entities will perhaps double, perhaps far more than double, the size of the NPDES permitting program. The affected pest control activities – now to be deemed unlawful absent an NPDES permit – protect our public health, our homes and communities, and the croplands and forestlands vital to our nation's food supply, security, and economy. They control

"mosquitoes, which transmit infectious diseases such as encephalitis and West Nile Virus; gypsy moths, which defoliate forests causing growth loss or the death of trees; algae and weeds, which can clog irrigation canals reducing the amount of water available to irrigate crops; and invasive species such as zebra mussels, which attach to and block water intakes for municipal water supplies and hydroelectric plants." App. 145a. The Sixth Circuit's decision sweeping these vital pest control activities into the onerous liability and permitting regime of the NPDES program threaten dire consequences, particularly in the areas of mosquito control and crop protection.

A. The Decision Overturns Three Decades of EPA Practice and Will Dramatically Expand the Scope of the NPDES Program.

In more than 35 years of administering the CWA, EPA has never issued an NPDES permit for the application of a pesticide or issued any policy interpretation or guidance indicating that such permits were required. *See* App. 73a. By sweeping pesticide use into the CWA ban on "pollutant" discharges, the Sixth Circuit's decision will single-handedly expand the universe of NPDES permittees by nearly double – perhaps by many times more. *See id.* 141a-142a.

In general, EPA estimates that the number of non-stormwater discharges regulated under NPDES permits has been relatively stable at around 100,000 facilities since the 1970s, until a recent Ninth Circuit decision required the addition of roughly 70,000 vessel (shipping) discharges. *Id.* 141a. Since the 1990s, the program has also included certain

regulated stormwater discharges, which today account for roughly 353,500 permitted facilities each year. *Id.* 141a-142a. Thus, the combined number of facilities permitted within the current program is roughly 520,000. EPA calculates that under a *narrow* reading of the Sixth Circuit's decision, and estimating pesticide applications from only eight categories of pesticide use patterns (*e.g.*, "insecticides used in wide-area insect suppression programs"), the decision will require NPDES permits for roughly ***5.6 million pesticide applications*** per year, by roughly 365,000 "applicators."[10] *Id.* 145a.

The impact on the scope of the permitting program could be far greater than even these figures suggest. EPA's current figures do not include, for example, pesticide application to water-dependent crops, such as rice, or to terrestrial cropland where drainage ditches or "wetland" areas are within or adjacent to cropped areas. The 5.6 million applications per year included in EPA's current projections, therefore, are likely the tip of the iceberg – even under a narrow reading of the court's ruling.

Of course, many advocates will urge a far broader reading of the Sixth Circuit's decision that, if adopted, would again multiply the number of pesticide uses covered. While EPA's current plans are limited to pesticide application in, over, and

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[10] EPA's estimate of the number of affected "applicators" presumably refers to commercial applicators. Yet the entity responsible for securing permit coverage will more likely be the farmer, forest landowner, county, etc. who makes the decision to use pesticide. Petitioners are aware of no estimate of the total number of entities needing permit coverage under the court's decision.

"near" waters, other uses often result in the "drift" of miniscule amounts of pesticide into waters. Such "drift" is arguably within the scope of the Sixth Circuit's flawed reasoning and will certainly be the subject of the next wave of citizen lawsuits.

B. The Decision Threatens Essential Activities That Protect Our Nation's Public Health and Food Supply.

1. Worldwide, "[m]osquitoes cause more human suffering than any other organism – over one million people die from mosquito-borne diseases every year."[11] In the United States, pesticides play a critical role in controlling the mosquito population. More than a thousand local government entities apply pesticides to, over, or near waters to control mosquito populations in the United States. *See* App. 145a. Simply put, anything that significantly curtails the use of pesticides in, over, and near waters threatens public health with outbreaks of West Nile virus, encephalitis, Dengue fever, and other mosquito-borne diseases. There is no vaccine or cure for these diseases, which are controlled only by controlling mosquito populations.

If the Sixth Circuit's decision stands, CWA liability and citizen suit enforcement will serve as a serious impediment to pesticide applications to control mosquito-borne diseases. As EPA has explained, the potential unavailability of permits when needed would "result in increased threats to public health because most efforts to control

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[11] Mosquito-Borne Diseases, American Mosquito Control Association, *available at* http://www.mosquito.org/mosquito-information/mosquito-borne.aspx.

mosquitos [sic], which transmit several debilitating diseases, will cease or risk CWA enforcement." App. 189a. Even in the event that EPA and the 46 NPDES-authorized State permitting agencies ultimately manage to issue "general permits" to cover many pesticide application scenarios – and then successfully defend those permits in litigation – there is an irreconcilable tension between an NPDES program focused narrowly on eliminating (or at least minimizing) the "pollutant" discharge and the needs of mosquito abatement programs focused on eradicating (or at least minimizing) mosquito-borne disease. If pesticide application is curtailed, public health officials will lose their best tool, mosquito populations will multiply, and mosquito-borne disease in the United States will spread.

2. The injection of NPDES permitting requirements into the highly precise and science-based process of modern crop protection also poses a substantial threat to the nation's supply of food and fiber. *See* App. 194a. Farmers use pesticides to protect food and non-food crops from infestation and loss due to weeds, insect pests, and disease. Even slight delays in application can result in less effective crop protection, the spread of pests and disease, and significant crop loss. *Id.* As USDA Secretary Thomas Vilsack explained in urging EPA to pursue review of the Sixth Circuit decision, delays due to NPDES permitting requirements "could cripple American farmers' emergency pest management efforts and hamper their ability to respond quickly to new infestations or threats of

infestations, thus increasing the risk of crop losses."[12] *Id.* 203a.

The risk of delay goes beyond farmers' pocketbooks and threatens national security and food supply. As EPA has explained, "federal agencies, working with state partners and growers must maintain the ability to respond immediately by application of pesticides, including aerial application if necessary, to deliberate or inadvertent introductions of new pests or diseases which may threaten the biosecurity of the United States. For example, a sudden large-scale introduction of Foot and Mouth disease, wheat rust or soybean red leaf blotch could threaten the U.S. food supply." App. 171a.

Effective crop protection also depends on farmers' ability to use carefully prescribed products and combinations of products at appropriate rates based on the particular crop, pest, and site-specific conditions at issue. *See id.* 194a-196a. NPDES permitting would add to this calculus a further layer of restrictions aimed squarely at minimizing (indeed, eliminating) the "pollutant" discharge, without

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[12] Fears of permitting delays are well founded based on the history of NPDES permitting. *See* Backlog Reduction, NPDES Program Basics, *available at* http://cfpub.epa.gov/npdes/permitissuance/backlog.cfm. Moreover, the theoretical possibility that EPA and 46 State permitting agencies may issue general permits offers little reassurance that permit coverage will be readily available. Environmental interest groups claim that *site-specific* control measures and water-quality impacts must be subject to agency review and public participation. *See, e.g., Waterkeeper Alliance, Inc. v. Envtl. Prot. Agency*, 399 F.3d 486, 503 (2d Cir. 2005).

regard for the essential function to be served by the so-called "pollutant." The result is that the rate and manner of pesticide application that most effectively controls crop infestation and disease likely *will not* coincide with the rate and manner of application prescribed under an NPDES permit.

II. THE DECISION BELOW TRAMPLES SETTLED PRINCIPLES OF JUDICIAL REVIEW AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The Rule reasonably establishes that the intentional application of pesticides in accordance with all relevant FIFRA requirements is not a discharge of a "pollutant ... from a point source" under the CWA – based largely on the CWA's definition of "pollutant" to include "chemical wastes," but not useful chemical products. The Sixth Circuit's decision runs roughshod over the statutory scheme and EPA's patently reasonable interpretation to declare its "plain language" ruling. The decision ignores settled rules of statutory interpretation and cannot be reconciled with this Court's precedents.

A. The Sixth Circuit's Reading of "Chemical Wastes" and "From a Point Source" Overrides the Common Meaning of Those Terms.

1. The Sixth Circuit found that "chemical waste" must be read to include *chemical products in use* for their intended purpose if the use of the product will result in waste. App. 19a-20a. Essentially, the court held that "chemical waste" unambiguously encompasses chemicals *that will*

become waste. *Id.* The court based this conclusion on plain language, notwithstanding: (a) its agreement with EPA that the common meaning of "chemical waste" is "discarded," "superfluous," or "excess" chemical, and (b) the Rule's focus on pesticides *intentionally* applied to, over, or near water in order to perform their purpose (the control of pests located in, over, or near water). *Id.* 18a, 110a-111a. The court apparently viewed chemical products in use for their intended purpose as *indistinct* from the chemical wastes that may remain after their use.[13] The court concluded that any chemical containing portions that *will become* waste must itself be regulated as a "chemical waste." *See id.* 20a ("If, on the other hand, a chemical pesticide is known to have lasting effects beyond the pesticide's intended object, then its use must be regulated under the Clean Water Act.")

The court's interpretation of "chemical wastes" stretches logic and English usage past the breaking point. No common understanding of the term "chemical wastes" would encompass all chemicals containing portions that *will become* waste. Yet the Sixth Circuit reached its interpretation on the basis of those words alone – citing nothing in the CWA or its history to suggest that Congress intended such a result. *Id.* 19a-20a. Even if the words "chemical wastes" could plausibly be construed to include

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[13] *See id.* 20a (when pesticides are intentionally applied to control pests in water, "both non-waste aqueous pesticide and pesticide residual are applied to the water at the same moment"); *id.* 26a ("pesticide residue or excess pesticide – *even if treated as distinct from pesticide* – is a pollutant discharged from a point source") (emphasis added).

products that have immediate value but that *will become* waste, those words can also reasonably be construed to *exclude* chemicals being used for their intended purpose. EPA's reasonable interpretation therefore must be upheld under this Court's precedents. *See Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1506 (2009) (rule upheld where statute does not "unambiguously preclude" EPA's interpretation).

2. The Sixth Circuit's interpretation of the CWA phrase "*from* a point source" is also fundamentally flawed. App. 23a-27a. As interpreted by EPA in the Rule, "pollutant ... from a point source" means that the substance at issue is a "pollutant" when it comes "from" the point source conveyance. App. 86a. This follows the common understanding of "from." One cannot spray ice "from" a hose, even though water sprayed from a hose may later become ice. Nor can one squeeze butter "from" a cow. Likewise, pesticide *waste* is not discharged "from" application equipment during pesticide use, even if some portion of the pesticide may subsequently miss its target or leave residue in the environment. At the very least, this reading is permissible and must therefore be upheld.[14]

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[14] The Sixth Circuit observed that EPA "offer[ed] no direct support for its assertion that a pesticide must be 'excess' or 'residue' at the *time of discharge* if it is to be considered as discharged *from a 'point source.'*" App. 24a (emphasis in original). Yet the only "support" needed by the agency is the statute itself, which plainly allows (if not dictates) EPA's interpretation. As explained in *Entergy*, 129 S.Ct. at 1507, the mere fact that a statute does not explicitly *require* a particular construction does not mean that such an interpretation is

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The Sixth Circuit, however, held that EPA's construction was categorically foreclosed by CWA. According to the court, the CWA phrase "*from* a point source" can only mean "*by* a point source." App. 26a-27a. Thus, in the court's view, pesticide waste is discharged "from" a point source if it is added to waters "by" a point source. *Id.* The court then reasoned that pollutants are added "by" a point source whenever the point source is a "but for" cause of the addition of pollutants to navigable waters. *Id.*

The Sixth Circuit arrived at its unlikely interpretation with absolutely no discussion of the common understanding of the word "from" or of the plausibility of EPA's construction. App. 24a-27a. Instead, the court relied on a separate EPA rulemaking and an Eleventh Circuit decision concerning a completely unrelated issue. *Id.* 25a-27a. Both of these authorities addressed whether the transfer of polluted waters from one waterbody into another is an "addition of any pollutant to navigable waters from any point source." *See* 73 Fed. Reg. 33,697, 33,701 (June 13, 2008); *Miccosukee Tribe of Indians v. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368 (11th Cir. 2002), *vacated,* 541 U.S. 95 (2004). Neither authority remotely bears on whether pollutants are discharged "from" a point source when the substance is not yet a "pollutant" at the time of

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precluded. The Sixth Circuit lost sight of this distinction when if found EPA may not interpret the CWA to require all elements of a "discharge of a pollutant" to be present at the same time unless the statute spells that out. The practical result of the court's approach is that ambiguity weighs *against* the agency, not in its favor as *Chevron* dictates.

the purported discharge. These extraneous materials shed no light on Congress's intent regarding NPDES permitting for pesticide use and have no place in a "plain language" decision vacating the Rule.

3. Aside from its dubious "plain language" assertion, the Sixth Circuit identified only two sources of support for its interpretation in all of the CWA and its legislative history: the general statutory purpose to protect water quality, and legislative history purportedly reflecting a desire to control pollutants "at the source whenever possible." App. 25a. Such general policies – which do not address the precise question at issue – cannot foreclose a reasonable reading of ambiguous statutory terms. In fact, this was exactly the error that this Court reversed in *Chevron*, rejecting an appellate court's attempt to invoke the general "purpose of the [Clean Air Act] permit program ... to improve air quality" to invalidate an agency interpretation. *See* 467 U.S. at 841-42. This Court found that such general purposes were not probative of the "actual intent of Congress" on the precise question at issue. *Id.* at 861-62. So too here. The Sixth Circuit's recasting of the "from a point source" limit cannot be reconciled with this Court's admonition that judges interpret the words of statutes, not rewrite them to better serve the court's notion of the statutory purpose.

The Sixth Circuit's overbroad construction of such common terms as "waste" and "from" suggests that when a statute has a general beneficial purpose, the plain meaning of its terms is whatever meaning achieves the broadest possible reading. But beneficial purposes do not dictate that common

words be given their broadest possible reach; common language admits of reasonable limits in accordance with ordinary usage and common sense. *See Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870, 1879 (2009)(statutory terms may not be read to extend liability beyond the "ordinary meaning" – not the broadest possible meaning – of those terms). Notwithstanding the broad goals of the CWA, "chemical waste," in common parlance, means chemicals that *are* waste – not chemicals that *will become* waste. "Pollutants ... *from* a point source," in common parlance, means pollutants *coming out of* a point source – not pollutants *caused by* a point source. The words and their natural reading are fairly simple. The Sixth Circuits pursuit of statutory goals took them too far.

B. The Decision Contravenes This Court's Precedents by Disregarding Statutory Context and History That Support the EPA Rule.

The Sixth Circuit's decision omits any meaningful inquiry into congressional intent with regard to permitting requirements for pesticide use. By prematurely declaring the statute's plain meaning at the outset, based on the court's intuition about what was intended and without consideration of the statute's context, the decision pretermits an essential part of judicial review and departs from the settled teachings of this Court. *Chevron* and many other cases of this Court demonstrate that premature declarations of plain meaning are not appropriate if they serve to cut off real inquiry and insight into whether Congress actually addressed the issue in question.

1. The Sixth Circuit purported to reject the Rule based on what has become known as *Chevron* "Step One," determining whether Congress has "directly spoken to the precise question at issue." *Cf. Chevron*, 467 U.S. at 842 ("First, always, is the question whether Congress has directly spoken to the precise question at issue."). Yet the court declared the statutory language clear based on an incomplete analysis, with no consideration of contextual evidence of Congress's intent on the question of permit requirements for pesticide use. In this respect, the Sixth Circuit's pre-emptive "Step One" analysis based on plain language fails to meaningfully address whether Congress has "directly spoken to the precise question at issue." In so doing, the court's approach also eliminates entirely any inquiry into whether the agency's interpretation of the statute is consistent with the congressional commands and therefore "permissible" under *Chevron* Step Two.[15] By simply declaring the provisions at issue to be plain – when those provisions surely were susceptible, at a minimum, to two different interpretations – the Sixth Circuit cut

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[15] Because the Sixth Circuit purported to stop at *Chevron* "Step One," it entirely omitted any "Step Two" inquiry into whether EPA's interpretation is permissible. *Chevron*, 467 U.S. at 843 ("if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"). Of course, the court could have skipped the "supposedly prior inquiry" of *Chevron* "Step One" by proceeding directly to "Step Two." *Entergy*, 129 S.Ct. at 1505, n.4 (explaining, "if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable"). What the court may not do, however, is fail to meaningfully address *either* inquiry.

off the analysis at the threshold, without *ever* examining the statute as a whole and in context, either as part of *Chevron* Step One or *Chevron* Step Two.

By declaring statutory language to be plain when, at best, it can be viewed as such only by ignoring all statutory and historic evidence to the contrary, the Sixth Circuit's approach renders agency interpretive rules vulnerable to the subjective interpretations and policy making of judges. That is not what *Chevron* seeks to accomplish.

Chevron's two-step process was intended to structure the inquiry into Congress's intent, not truncate that inquiry. As *Chevron* and many other decisions of this Court make plain, in determining whether a phrase is ambiguous, the court must look not only at the particular provision at issue, but must employ all the traditional tools of statutory construction. *Chevron*, 467 U.S. at 843, n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) ("[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context.... It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (citing *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000)) (internal quotation marks omitted); *Zuni Pub. School Dist. No. 80 v. Dep't of Educ.*, 550

U.S. 81, 98 (2007) ("statutory '[a]mbiguity is a creature not [just] of definitional possibilities but [also] of statutory context.'") (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

Had the Sixth Circuit examined the statutory provisions in context, it would have found considerable evidence that Congress *did* consider the subject of pesticide use in connection with the CWA and chose *not* to subject pesticide use to NPDES permitting. As discussed below, that evidence is found in the CWA's specific references to pesticide use and other agricultural activities in other sections of the statute. It is also found in the context provided by the radically different FIFRA scheme enacted by the same Congress specifically to address the environmental effects of pesticide use. And finally, it is found in the contemporaneous interpretation of EPA, shortly after enactment of both statutes, at a time when EPA officials had a strong basis for understanding congressional intent concerning pesticides use.

2. Within the CWA, Congress specifically sought to avoid a collision between beneficial pesticide use and water quality protection by keeping agricultural activities, including pesticide use, outside the CWA's regulatory programs. Congress explicitly considered the water quality effects of agricultural pesticide use and purposefully established non-regulatory mechanisms to develop the information and tools necessary to reduce those impacts without impairing the use of pesticides for the production of abundant food and fiber. *See supra* page 5.

The Act required EPA to research "new and improved methods and the better application of

existing methods of preventing, reducing, and eliminating pollution from agriculture, including the legal, economic, and other implications of the use of such methods"). 33 U.S.C. § 1254(p), App. 33a. CWA Section 208 required the establishment of "areawide waste treatment management plans," to be developed by state or local organizations, which must identify "agriculturally and silviculturally related nonpoint sources" and "procedures and methods (including land use requirements) to control to the extent feasible such sources." *Id.* § 1288(b)(F), App. 36a. These decidedly State-driven, cost-sensitive programs belie any suggestion that Congress intended wide-spread NPDES permitting requirements for agricultural pesticide use.

Section 104(l) specifically addresses the water quality impact of pesticides, but does not characterize them as "pollutants." To the contrary, it directs the President to investigate "methods to control the release of pesticides into the environment" and to report back to Congress on those investigations "together with his recommendations for any necessary legislation." 33 U.S.C. §§ 1254(l)(1)-(2), App. 32a-33a. Such tentative measures show Congress did not treat pesticide use in, over, or near waters as a "discharge of a pollutant" subject to the NPDES permitting requirements.[16] Indeed, despite Congress's specific

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[16] Contemporaneous statements in the Congress also reflect that understanding. For example, commenting on these provisions, Senator Dole explained that they would "*place responsibility on the States* for instituting and expanding the control of water pollution related to agriculture." S. Rep. No. 92-414, 90, *as reprinted in* 1972 U.S.C.C.A.N 3668, 3759 (continued...)

focus on pesticides in Section 104(l), the term is notably absent from the definition of "pollutant." "Pesticides" appears nowhere in the laundry list of materials that are pollutants. *See* 33 U.S.C. 1362(6) (pollutant means, *inter alia*, "solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions ... chemical wastes, biological materials, ... and industrial, municipal, and agricultural waste").

Thus, nowhere in the text or legislative history of the Act is there any hint that Congress viewed pesticide use as a "discharge of a pollutant" subject to NPDES permitting. Given the importance and widespread use of pesticides for food and fiber production and other beneficial purposes, it is inconceivable that Congress would have required NPDES permitting for pesticide use without *some* discussion reflected in the legislative history. *See Brown & Williamson*, 529 U.S. at 147 ("Given the economic and political significance of the tobacco industry at the time, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the [Food Drug and Cosmetic Act]

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(supplemental views) (emphasis added). He noted the *non*point source nature of most agricultural pollution sources – including pesticide use. *Id.* at 3760. And he further emphasized that "[p]esticides provide substantial benefits to mankind by protecting plants and animals from pest losses." *Id.* at 3760. In light of these benefits, Senator Dole explained that "[t]he use of pesticides and other agricultural chemicals will undoubtedly retain a high level of importance in agriculture for the foreseeable future. In the meantime efforts at both State and Federal levels are paying off in securing the registration [pursuant to FIFRA] and adherence to recommended usages." *Id.*

absent any discussion of the matter.") As this Court has observed, Congress "does not hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

Reading the "pollutant" definition and its reference to "chemical wastes" in the context of other CWA provisions thus makes plain that Congress considered the water quality impact of pesticide use and established non-regulatory mechanisms to address those impacts. At the very least, this history and context precludes the Sixth Circuit's conclusion that Congress *unambiguously required* the regulation of pesticide use as a CWA pollutant discharge.

3. The overall statutory scheme provides further support for the Rule. The NPDES program at its core is not a program to regulate beneficial activities that also can have adverse environmental effects, but a program to eliminate pollutant discharges seen as serving no societal good. *Supra* pages 3-4. To find that Congress intended to deem pesticide use to be a "discharge of a pollutant," one must conclude that Congress intended in 1972 to eliminate the use of pesticides (or at least the use of pesticides in or over waters, including wetlands), preferably by 1985. *See* 33 U.S.C. § 1251(a)(1), App. 31a. Yet that conclusion cannot be reconciled with the CWA provisions and statutory context demonstrating Congress's recognition of the vital role of pesticides in the protection of our nation's health and welfare and its specific intent to address the water quality impact of pesticide use through State-driven non-regulatory programs. *See supra* pages 4-5.

4. The historical context of the CWA's enactment further demonstrates congressional intent regarding pesticide use. Indeed, three days after passing the 1972 CWA, the same Congress enacted major FIFRA amendments to "regulate the use of pesticides to protect man and his environment." S. Rep. No. 92-838, at 1 (1972), as reprinted in 1972 U.S.C.C.A.N. at 3993. *See* Pub. L. 92-516, 86 Stat. 973. The dramatically different scheme crafted specifically to address the environmental effects of pesticide use leaves no room for doubt that Congress did not intend to regulate pesticide use through NPDES permitting. *See Brown & Williamson*, 529 U.S. at 133 ("the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand").

Unlike the CWA NPDES program, the FIFRA scheme at its core is a program to regulate beneficial activities – the sale, distribution and use of pesticides – that also can have adverse environmental effects. In FIFRA, Congress created a scheme in which EPA would assess the adverse environmental effects, including the effects on water,[17] of registered pesticides and approve label restrictions to ensure that the use of the pesticide would not cause "unreasonable adverse effects on the environment."[18] *See* 7 U.S.C. §§ 136j(a)(2)(G),

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[17] FIFRA defines "environment" to include "water." 7 U.S.C. § 136(j).

[18] "Unreasonable adverse effects on the environment" means "any unreasonable risk to man or the environment, (continued...)

136a(c)(5), App. 67a, 66a-67a. To regulate the use of pesticides by end users such as farmers or commercial applicators, FIFRA prohibited the use of a registered pesticide "in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G), App. 67a. Yet, in contrast to CWA pollutant discharge requirements, there was no FIFRA requirement that pesticide users seek advance government authorization to use pesticides and thus no delay in pesticide use while awaiting government approval of application at a particular location.

Given Congress's specific focus in 1972 on mitigating the environmental effects of pesticide use through the FIFRA amendments, as well as its careful attention to limiting pesticide use only upon careful balancing of risks versus benefits, it is highly improbable that Congress intended simultaneously to subject pesticide use to the far more inflexible scheme of the CWA NPDES program. It is all the more unlikely that Congress would have done so without any discussion in the context of enacting either the CWA or FIFRA amendments.

5. Finally, the regulatory history supports EPA's interpretation. Immediately after enactment of these two contrasting statutory schemes and for more than three decades afterwards, EPA implemented them to regulate pesticide use under FIFRA and not under the NPDES permitting program. EPA's original, *contemporaneous*

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taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." *See id.* § 136(bb), App. 65a (emphasis added).

interpretation is entitled to weight. *See, e.g., Davis v. United States*, 495 U.S. 472, 484 (1990) ("[W]e give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use.") (citations omitted); *Guardians Ass'n v. Civil Serv. Comm'n of the City of New York*, 463 U.S. 582, 618 (1983) ("As a contemporaneous construction of a statute by those charged with setting the law in motion, these regulations deserve substantial respect in determining the meaning of [the statute].")[19] At the very least, this context – along with ambiguity in the text and the absence of any contrary indication of congressional intent – precludes the Sixth Circuit's conclusion that Congress has unambiguously required the regulation of pesticide use as the "discharge of a pollutant."

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[19] The Sixth Circuit did not acknowledge EPA's repeated statements throughout this proceeding that the agency has never required or issued an NPDES permit for pesticide use. Instead, the court cited only EPA requirements that pesticide labels indicate that pesticide may not be "discharge[d] into lakes, streams, ponds, or public waters unless in accordance with an NPDES permit." App. 6a. These references suggest that the court misconstrued EPA's historic position. The required label statements simply pertain to pesticide waste that may be contained in industrial effluent or other waste streams, which is not implicated by the Rule. *Id.* 85a. They have no relevance to EPA's 35-year practice of not requiring NPDES permitting for pesticide use.

C. The Sixth Circuit's Reading of "Biological Materials" Disregards Statutory Context and Conflicts With Decisions of This Court and the Ninth Circuit.

The Sixth Circuit's neglect of statutory context also led to its erroneous interpretation of "biological materials." Focusing exclusively on the text of the provision, the Sixth Circuit found that the "plain, unambiguous nature of this language compels this Court to find that *matter of a biological nature*, such as biological pesticides, qualifies as a biological material and falls under the [CWA]." App. 21a (emphasis added). Again ignoring all evidence of Congress's intent *not* to regulate pesticide use as a CWA "pollutant" discharge, the Sixth Circuit did opt to consider statutory context in just one respect. Placing great weight on the contrast between Congress's reference to "chemical *wastes*" and "biological *material*," the court found this contrast dictated even *more expansive* regulation of biological pesticides. *Id.* 22a. As the court explained, apparently without irony, "if we are to give meaning to the word 'waste' in 'chemical waste,' we must recognize Congress's intent to treat biological and chemical pesticides differently." *Id.* The court thus decided that EPA must regulate *all* biological pesticides in use – *regardless* of whether they will leave any residue after their use is complete. *Id.* 23a.

Contrary to the Sixth Circuit's reading, however, both this Court and the Ninth Circuit have found that the term "materials" in the CWA pollutant definition (*e.g.*, "biological materials" and "radioactive materials") does *not* unambiguously

include all "matter." *Train v. Colo. Pub. Interest Research Group*, 426 U.S. 1, 23-25 (1976) ("*Colorado PIRG*"); *Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1016-18 (9th Cir. 2002). Indeed, in *Colorado PIRG*, this Court reversed the Tenth Circuit's ruling that "radioactive materials" includes *all* radiological materials where the lower court declined to consider legislative history indicating a narrow meaning was intended. 426 U.S. at 9-10. The Court cautioned, "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *Id.* at 10 (quoting *United States v. Am. Trucking Ass'n*, 310 U.S. 534, 543-44 (1940)).

Likewise here, the Sixth Circuit cannot properly disregard the statutory and historic context that demonstrates Congress's intent *not* to regulate pesticide use under the CWA. *Supra* pages 4-6. Read in the light of that context, the CWA is at least ambiguous as to whether biological pesticides in use are "pollutants." This is particularly true given Congress's inclusion of "chemical *wastes*" but not "chemicals" or "chemical products" and the likelihood that Congress gave no thought at all to the existence of the far less common *biological* pesticides. App. 83a. Reading all the relevant CWA provisions in context, as any member of Congress would have read them in 1972, one cannot conclude that the CWA unambiguously requires NPDES permitting for pesticide use – biological or chemical.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ellen Steen
Counsel of Record
Clifton S. Elgarten
Jessica A. Hall
CROWELL & MORING LLP
1001 Pennsylvania Ave. NW
Washington, DC 20004-2595
(202) 624-2500

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 06-4630, 07-3182, 07-3185, 07-3180, 07-3183, 07-3186, 07-3181, 07-3184, 07-3187.

The NATIONAL COTTON COUNCIL OF AMERICA, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellees.

April 29, 2008, Argued,
Jan. 7, 2009, Filed

Before: GUY, SUHRHEINRICH, and COLE, Circuit Judges.

OPINION

COLE, Circuit Judge:

These proceedings involve a final regulation issued by the Environmental Protection Agency (the "EPA") under the Clean Water Act, 33 U.S.C. § 1251 et seq. The Clean Water Act regulates the discharge of "pollutants" into the nation's waters by, among other things, requiring entities that emit "pollutants" to obtain a National Pollutant Discharge Elimination System ("NPDES") permit. *Id.* §§ 1311(a), 1342. On November 27, 2007, the EPA issued a Final Rule concluding that pesticides applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (the "FIFRA") are exempt from the Clean Water Act's permitting requirements. *See* 71 Fed. Reg. 68,483 (Nov. 27, 2006) (the "Final Rule"). Two different groups of Petitioners-one representing environmental interest groups and the other representing industry interest groups-oppose the EPA's Final Rule as exceeding the EPA's interpretive authority. The EPA defends the Final Rule by arguing that the terms of the Clean Water Act are ambiguous and that the Final Rule is a reasonable construction of the Clean Water Act entitled to deference from this Court. We cannot agree. The Clean Water Act is not ambiguous. Further, it is a fundamental precept of this Court that we interpret unambiguous expressions of Congressional will as written. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Therefore, we hold that the EPA's Final Rule is not a reasonable interpretation of the Act and **VACATE** the Final Rule.

I. BACKGROUND

A. The Regulatory Background

1. The Clean Water Act

Congress enacted the Clean Water Act "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 582 (6th Cir.1988) (quoting 33 U.S.C. § 1251(a)). The goal of the Clean Water Act is to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2). Thus, the Act provides that "the discharge of any pollutant by any person shall be unlawful." *Id.* § 1311(a). "Pollutant" is a statutorily defined term that includes, at least, "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* § 1362(6). The Supreme Court has held that this list is not exhaustive and that "pollutant" should be interpreted broadly. *Rapanos v. United States*, 547 U.S. 715, 724, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006).

The Clean Water Act prohibits the discharge of any "pollutant" into navigable waters from any "point source" unless the EPA issues a permit under the NPDES permitting program, 33 U.S.C. §§ 1311(a), 1342, where a "point source" is "any dis-

cernible, confined, and discrete conveyance ... from which pollutants are or may be discharged." *Id.* § 1362(14). The permitting program constitutes an exception to the Clean Water Act's prohibition on pollutant discharges into the Nation's waters. *Id.* §§ 1311(a), 1342; 40 C.F.R. § 122.3. Thus, if a party obtains a permit, the discharge of pollutants in accordance with that permit is not unlawful. *Id.*

Before a permit is issued, the EPA, or a state agency that has been approved by the EPA, evaluates the permit application to ensure that the discharge of a pollutant under the proposed circumstances will not cause undue harm to the quality of the water. *See* 33 U.S.C. § 1342. In addition to granting permits for specific discharges, the EPA and state authorities may also grant general permits that allow for the discharge of a specific pollutant or type of pollutant across an entire region. *Id.* For example, prior to the EPA's adoption of the Final Rule, the State of Washington had issued a general permit to allow for the application of all aquatic pesticides in the State. *See Acquatechnex v. Washington Dep't of Ecology*, PCHB No. 02-090, 2002 WA ENV LEXIS 87, *2-5 (Pollution Control Hr'gs Bd. Dec. 24, 2002).[1]

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[1] The State of California's State Water Resources Control Board (the "Board") also issued a general permit that covered all aquatic pesticide discharges, as long as the discharger certified that alternative options had been evaluated and that any impact the pesticide application had on the water quality would be reported to the Board. General Permit No. CAG990003, 2001 Cal. ENV LEXIS 12, at *1, 3-4, 19-21 (July 19, 2001).

As a result, users of aquatic pesticides in Washington could discharge those pesticides covered by the rule without obtaining a permit. These general permits "greatly reduce [the] administrative burden by authorizing discharges from a category of point sources within a specified geographic area." *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 n. *, 124 S.Ct. 1537, 158 L.Ed.2d 264 (2004) (citing 40 C.F.R. § 122.28(b)(2)(v)). "Once [the] EPA or a state agency issues such a [general] permit, covered entities, in some cases, need take no further action to achieve compliance with the NPDES besides adhering to the permit conditions." *Id.*

2. The Federal Insecticide, Fungicide, and Rodenticide Act

The EPA also regulates the labeling and sale of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act. Under the FIFRA, all pesticides sold in the United States must be registered with the EPA. *See* 7 U.S.C. § 136 et seq. The EPA approves an insecticide for registration only when it finds that the chemical, "when used in accordance with widespread and commonly recognized practice ... [,] will not generally cause unreasonably adverse effects on the environment." *No Spray Coalition v. City of New York*, 351 F.3d 602, 604-05 (2d Cir.2003) (quoting 7 U.S.C. § 136a(c)(5)(D)). Under the FIFRA, the EPA issues a "label" for each registered pesticide, indicating the manner in which it may be used; the statute makes it unlawful "to use any pesticide in a manner inconsistent with its labeling." *Id.* (quoting 7 U.S.C. § 136j(a)(2)(6)).

For nearly thirty years prior to the adoption of the Final Rule, pesticide labels issued under the FIFRA were required to contain a notice stating that the pesticide could not be "discharge[d] into lakes, streams, ponds, or public waters unless in accordance with an NPDES permit." EPA's Policy and Criteria Notice 2180.1 (1977). Despite amendments made to the FIFRA's labeling requirements over the years, pesticide labels have always included a notice about the necessity of obtaining an NPDES permit. *See* EPA's Policy and Criteria Notice 2180.1 (1984); Pesticide Registration ("PR") Notice 93-10 (July 29, 1993); PR Notice 95-1 (May 1, 1995); *see also* EPA-738-7-96-007 (Feb.1996), *available at* http:// www. epa. gov/ oppsrrd 1/ REDs/ factsheets/ 3095 fact. pdf, (Pesticide Reregistration notification for 4, 4-Dimethyloxazolidine) (referring to the labeling requirement described in the PR Notice).

3. The Regulatory Framework Under the Final Rule

Under the Clean Water Act, pollutants may only be discharged according to a permit unless they fit into one of the exceptions listed in the federal regulations at 40 C.F.R. § 122.3. The Final Rule revises the regulations by adding pesticides to these exceptions as long as they are used in accordance with the FIFRA's requirements. 71 Fed. Reg. at 68,485, 68,492. Specifically, the Final Rule states that pesticides applied consistently with the FIFRA do not require an NPDES permit in the following two circumstances:

> (1) The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds, or other pests that are present in waters of the United States.
>
> (2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; for example, when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or where pesticides are applied over or near water for control of adult mosquitoes or other pests.

40 C.F.R. § 122.3(h).

Although the EPA, through its Final Rule, takes the position that pesticides are not generally pollutants, it makes an exception for "pesticide residuals," which "include[ ] excess amounts of pesticide." 71 Fed. Reg. at 68,487. "Pesticide residuals" are those portions of the pesticide that "remain in the water after the application and its intended purpose (elimination of targeted pests) have been completed...." *Id.* The EPA concedes that pesticide residue (unlike pesticides generally) *is* a pollutant under the Clean Water Act because it is "waste[ ] of the pesticide application." *Id.* Nonetheless, the EPA con-

tends that pesticide residue is not subject to the NPDES permitting program because "at the time of discharge to a water of the United States, the material in the discharge must be both a pollutant, and from a point source." *Id.* According to the EPA, the residue cannot be subject to the permitting program because by the time it becomes a pollutant it is no longer from a "point source." Since no "point source" is at play, the EPA reasons, pesticide residue is a "nonpoint source pollutant" and therefore not subject to the permitting requirements. *Id.*

B. Procedural Background

Timely petitions for review of the Final Rule were filed in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits by either the "Industry Petitioners"[2] or the "Environmental Petitioners."[3] The petitions for review were consolidated in this circuit by an order of the Judicial Panel on Multidistrict Litigation, under

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[2] Agribusiness Association of Iowa, BASF Corporation, Bayer CropScience LP, CropLife America, Delta Council, Eldon C. Stutsman, Inc., FMC Corporation, Illinois Fertilizer & Chemical Association, The National Cotton Council of America, Responsible Industry for a Sound Environment, Southern Crop Production Association, and Syngenta Crop Protection, Inc., LP.

[3] Baykeeper, Californians for Alternatives to Toxics, California Sportfishing Protection Alliance, National Center for Conservation Science and Policy, Oregon Wild, Saint John's Organic Farm, Waterkeeper Alliance, Inc., Peconic Baykeeper, Inc., Soundkeeper, Inc., Environmental Maine, and Toxics Action Center.

28 U.S.C. §§ 1407 and 2112(a)(3). The self-titled "Industry Intervenors"[4] filed a motion to intervene in support of the Final Rule.[5]

Environmental Petitioners filed a timely motion to dismiss the petitions because of lack of subject matter jurisdiction or, alternatively, to transfer the cases to the Ninth Circuit. Industry Petitioners, the EPA, and Industry Intervenors opposed this motion. The Environmental Petitioners have also filed a complaint challenging the Final Rule in the Northern District of California in order to preserve review of the Final Rule in the event this Court grants their motion to dismiss. On July 24, 2007, we denied the motion to transfer and deferred the decision on the question of subject matter jurisdiction.

II. JURISDICTION

Environmental Petitioners contend that this dispute should be dismissed for lack of subject matter jurisdiction, arguing that original review of the Final Rule by the courts of appeals is not covered by the grant of original jurisdiction set forth in the Clean Water Act, 33 U.S.C. § 1369(b)(1). Environmental Petitioners are correct that "Congress did not intend court of appeals jurisdiction over all EPA actions taken pursuant to the Act." *Lake Cumberland*

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[4] Industry Intervenors include each of the Industry Petitioners listed above as well as American Farm Bureau Federation and American Forest & Paper Association.

[5] American Mosquito Association submitted a brief as amicus curiae in support of the Final Rule.

Trust, Inc. v. EPA, 954 F.2d 1218, 1222 (6th Cir.1992) (quoting *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1431 (9th Cir.1991)). However, we conclude that, at a minimum, § 1369(b)(1)(F) encompasses the action before us.

Under 33 U.S.C. § 1369(b)(1)(F), a party may challenge EPA actions "issuing or denying any permit under [33 U.S.C.] section 1342 ..." in the appropriate circuit court. The Clean Water Act's permitting program is set forth in § 1342. The jurisdictional grant of § 1369(b)(1)(F) authorizes the courts of appeals "to review the regulations governing the issuance of permits under section 402, 33 U.S.C. § 1342, as well as the issuance or denial of a particular permit." *Am. Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir.1992). Thus, in *Natural Resources Defense Council, Inc. v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir.1992), the court held that it had jurisdiction to review an EPA rule exempting uncontaminated storm-water discharge from the permitting regulations. The *Natural Resources* court concluded that it had "the power to review rules that regulate the underlying permit procedures." *Id.* at 1297 (citing *NRDC v. EPA*, 656 F.2d 768, 775 (D.C.Cir.1981) and *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977)). The Final Rule before us today likewise regulates the permitting procedures, and we therefore conclude that jurisdiction is proper under § 1369(b)(1)(F).

III. DISCUSSION

A. Standard of Review

Our review of agency decisions has two components. First, we determine whether the agency's chosen action complies with *Chevron*, 467 U.S. at 842-45, 104 S.Ct. 2778; *see United States v. Mead Corp.*, 533 U.S. 218, 227, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); *Riverkeeper, Inc. v. EPA* ("*Riverkeeper II*"), 475 F.3d 83, 95 (2d Cir.2007). When conducting *Chevron* review of the Final Rule, we "examine the [Final Rule] against the statute that contains the EPA's charge." *Riverkeeper, Inc. v. EPA* ("*Riverkeeper I*"), 358 F.3d 174, 183 (2d Cir.2004). Here, we must determine whether "the intent of Congress is clear as to the precise question at issue." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995); *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778. "In making [this] threshold determination under *Chevron*, a reviewing court should not confine itself to examining a particular statutory provision in isolation. Rather, the meaning-or ambiguity-of certain words or phrases may only become evident when placed in context." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 127 S.Ct. 2518, 2534, 168 L.Ed.2d 467 (2007). If the intent of Congress is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778. If, and only if, the statute is silent or ambiguous regarding the question at issue, we then move to step two of *Chevron* review and ask whether "the agency's

answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778. If the agency's "interpretation is reasonable, we must defer to its construction of the statute." *Wachovia Bank, N.A. v. Watters,* 431 F.3d 556, 562 (6th Cir.2005).

The second part of our review would require us to consider the Final Rule under the standards set forth by the Administrative Procedure Act section 10(2)(e), 5 U.S.C. § 706(2) (the "APA"), under which we are required to "hold unlawful and set aside agency action, findings, and conclusions" that, among other criteria, are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious where

> the agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency experience.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); *see also Citizens Coal Council,* 447 F.3d at 890. When conducting this form of review, we ensure that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts and the choice made." *Motor Vehicle Mfrs.,* 463

U.S. at 43, 103 S.Ct. 2856. "The court is required to make a 'searching and careful review' in its assessment of the agency action, but 'the ultimate standard of review is a narrow one.' " *Citizens Coal Council,* 447 F.3d at 890 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)).

B. The Parties' Positions

1. The Petitioners

Environmental Petitioners argue: (1) that the EPA exceeded its authority under the Clean Water Act in issuing a rule that excludes pesticides from the definition of "pollutant" under 33 U.S.C. § 1362(6); (2) that the EPA exceeded its authority under the Clean Water Act when it determined that, while pesticides are discharged by point sources, the residue of these pesticides is nonetheless a "nonpoint source pollutant"; and (3) that the EPA may not exempt FIFRA-compliant applications of pesticides from the requirements of the Clean Water Act. Industry Petitioners, on the other hand, argue that the Final Rule is arbitrary and capricious because it treats pesticides applied in violation of the FIFRA as pollutants, while it treats the very same pesticides used in compliance with the FIFRA as non-pollutants. In other words, the Industry Petitioners complain that whether something constitutes a pollutant should not hinge upon compliance with the FIFRA.

2. The EPA

As described above, the EPA's Final Rule exempts from the NPDES permitting program pesticides that are applied directly to the Nation's waters, or near such waters, in order to control pests. 40 C.F.R. § 122.3(h). The EPA says that its Final Rule exempts both pesticides generally and "pesticide residue," which includes "excess pesticide." 71 Fed. Reg. at 68,487.

The EPA provides two reasons that its Final Rule is reasonable. First, the EPA argues that the Clean Water Act as it applies to pesticides is ambiguous. The EPA contends that it reasonably determined that pesticides applied according to the FIFRA requirements are not pollutants and therefore are not subject to the NPDES permitting program. The EPA reasons that "Congress defined the term 'pollutant' in the Clean Water Act to mean one of 16 specific items." (EPA Br. at 22.) Of these sixteen, the EPA states that pesticides, which are either chemical or biological in nature, may only be considered to be "chemical wastes" or "biological materials." 71 Fed. Reg. at 68,486. The EPA argues that pesticides are not "chemical wastes" in the ordinary dictionary definition of the word "waste," because waste is that which is "eliminated or discarded as no longer useful or required after the completion of a process." *Id.* (quoting *The New Oxford American Dictionary* 1905 (Elizabeth J. Jewell & Frank Abate eds., 2001)). Rather than being wastes, the EPA reasons that pesticides applied according to the FIFRA's labeling requirements "are products that the EPA has evaluated and registered for the purpose of con-

trolling target organisms, and are designed, purchased, and applied to perform that purpose." *Id.* The EPA next concludes that pesticides applied in accordance with the FIFRA are not "biological materials" because to find otherwise would lead to the anomalous result "that biological pesticides are pollutants, while chemical pesticides used in the same circumstances are not." *Id.*

The EPA's second argument attempts to justify its Final Rule as applied to pesticide residue. In contrast to pesticides generally, which the EPA contends are *not* pollutants, the EPA concedes that pesticide residue and excess pesticide *are* pollutants within the meaning of the Clean Water Act because "they are wastes of the pesticide application." 71 Fed. Reg. at 68,487. The EPA also concedes that pesticides are discharged from a point source. *Id.* at 68,487-88. Nonetheless, the EPA concludes that no permit is required for pesticide applications that result in excess or residue pesticide because it interprets the Clean Water Act as requiring permits only for discharges that are "both a pollutant, and from a point source" at the time of discharge. *Id.* at 68,487.

C. Analysis

1. Are Pesticides Unambiguously "Pollutants" Within the Meaning of the Act?

The first question under *Chevron* is whether the Clean Water Act unambiguously includes pesticides within its definition of "pollutant." Under this first step, this Court determines "whether Congress

has directly spoken to the precise question at issue." 467 U.S. at 842, 104 S.Ct. 2778. This is determined by "employing traditional tools of statutory construction." *Id.* The meaning of a statute "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997); *see also Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35, 110 S.Ct. 929, 108 L.Ed.2d 23 (1990) ("Our 'starting point is the language of the statute.' ... but 'in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' ") (citations omitted). If Congress's intent is clear from the statutory language, then "that intent must be given effect." *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778.

As noted above, the Clean Water Act defines "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). This Court has previously concluded that the "broad generic terms" included in the definition of "pollutant" demonstrate Congress's intent to capture more than just the items expressly enumerated. *United States v. Hamel*, 551 F.2d 107, 110 (6th Cir.1977) (concluding that the Clean Water Act covers, at a minimum, those pollutants covered under the Refuse Act, which applies to "all foreign substances" not explicitly exempted from coverage); *see*

also, e.g., Cedar Point Oil Co., 73 F.3d at 565 ("[T]he breadth of many of the items in the list of 'pollutants' tends to eviscerate any restrictive effect."); *No Spray Coalition, Inc.*, 2005 U.S. Dist. LEXIS 11097, at *17 (citing S.Rep. No. 92-414 at 76 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3742). However, we need not consider the term's breadth today. Rather, we find the plain language of "chemical waste" and "biological materials" in § 1362(b) to be unambiguous as to pesticides. This Court must, therefore, give effect to the Congress's expressed intent. *See Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778.

a. Chemical Waste

Generally, a court should give a word in a statute its "ordinary, contemporary, common meaning, absent an indication Congress intended [it] to bear some different import." *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Attorney*, 369 F.3d 960, 967 (6th Cir.2004) (quoting *Williams v. Taylor*, 529 U.S. 420, 431-32, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000)). The EPA refers the Court to *The New Oxford American Dictionary* (Jewell & Abate eds.2001), which defines waste as "eliminated or discarded as no longer useful or required after the completion of a process." *Id.* at 1905. Industry Petitioners point the Court to *Black's Law Dictionary* (8th ed.2004), which defines waste as "[r]efuse or superfluous material, esp. that after a manufacturing or chemical process." *Id.* at 1621. Similarly, the Ninth Circuit has accepted the American Heritage Dictionary's definition of waste as "any useless or worthless byproduct of a process or the like; refuse or excess material." *N. Plains Res. Council v. Fidelity*

Exploration & Dev. Co., 325 F.3d 1155, 1161 (9th Cir.2003); *Fairhurst v. Hagener*, 422 F.3d 1146, 1149 (2005).

Under any of these definitions of "waste," "chemical waste" for the purposes of the Clean Water Act would include "discarded" chemicals, "superfluous" chemicals, or "refuse or excess" chemicals. As such, under a plain-meaning analysis of the term, we cannot conclude that all chemical pesticides require NPDES permits. Rather, like our sister circuit in *Fairhurst*, we conclude that: so long as the chemical pesticide "is intentionally applied to the water [to perform a particular useful purpose] and leaves no excess portions after performing its intended purpose[ ] it is not a 'chemical waste,' " 422 F.3d at 1149, and does not require an NPDES permit. *Id.*

On the other hand, as Environmental Petitioners argue and the EPA concedes, excess pesticide and pesticide residue meet the common definition of waste. To this extent, the EPA's Final Rule is in line with the expressed intent of Congress, as the Rule defines these pesticide residues as pollutants "because they are wastes of the pesticide application." 71 Fed. Reg. at 68,487. The EPA aptly states:

> [P]esticides applied to land but later contained in a waste stream, including storm water regulated under the Clean Water Act, could trigger the requirement of obtaining an NPDES permit.... In addition, if there are residual materials resulting from pesticides that remain in the water after the application and its

> intended purpose has been completed, the residual materials are pollutants because they are substances that are no longer useful or required after the completion of a process.

(EPA Br. 29-30.) This Court agrees.

Therefore, at least two easily defined sets of circumstances arise whereby chemical pesticides qualify as pollutants under the Clean Water Act. In the first circumstance, a chemical pesticide is initially applied to land or dispersed in the air-these pesticides are sometimes referred to as either "terrestrial pesticides" or "aerial pesticides" and include applications "above" or "near" waterways. At some point following application, excess pesticide or residual pesticide finds its way into the navigable waters of the United States. Pesticides applied in this way and later affecting the water are necessarily "discarded," "superfluous," or "excess" chemical. Such chemical pesticide residuals meet the Clean Water Act's definition of "chemical waste."

In the second circumstance, a chemical pesticide is applied directly and purposefully to navigable waters to serve a beneficial purpose-such pesticides are often referred to as "aqueous" or "aquatic" pesticides. As contemplated by the EPA, if residual aquatic pesticide "remain[s] in the water after the application and [the pesticide's] intended purpose has been completed," then the residue would likewise qualify as a "chemical waste." (EPA Br. 29-30.) As such, these chemical wastes would unambiguously fall within the ambit of the Clean Water Act.

This second scenario, of course, leads to the inevitable quandary that both non-waste aqueous pesticide and pesticide residual are applied to water at the same moment, which then gives rise to the question of how the EPA can regulate and permit the residual. However, this problem is more theoretical than practical. In reality, whether or not a particular chemical pesticide needs to be regulated can be easily answered by both the EPA's and industry's experience with that pesticide. If, as was the case in *Fairhurst,* a chemical such as antimycin leaves no excess portions after performing its intended purpose, then that chemical's use need not be regulated. *See Fairhurst,* 422 F.3d at 1149. If, on the other hand, a chemical pesticide is known to have lasting effects beyond the pesticide's intended object, then its use must be regulated under the Clean Water Act. *See also Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532-33 (9th Cir. 2001).

b. Biological Materials

Continuing our review under *Chevron,* we must examine the "ordinary, contemporary, [and] common meaning" of "biological materials." *Grand Traverse Band,* 369 F.3d at 967. Environmental Petitioners point out that *Webster's Third New International Dictionary* (Gove ed.1993) defines "material" as "of, relating to, or consisting of matter" and "the basic matter from which the whole or the great part of something is made." *Id.* at 1392. The *Oxford English Dictionary* provides that "material" is "that which constitutes the substance of a thing (physical or nonphysical); a physical substance; a material thing." OED Online, *available at* http:// dictionary.

oed. com/ cgi/ entry/ 00303279? que ry_ type= word & queryword= material& firs t= 1& max_ to_ show= 10& sort_ type= alpha& result_ place = 1& search_ id = Vo Pl- c Vw Rj A- 12823& hilite = 00303279. The plain, unambiguous nature of this language compels this Court to find that matter of a biological nature, such as biological pesticides, qualifies as a biological material and falls under the Clean Water Act if it is "discharged into water." 33 U.S.C. § 1362(6).

The EPA points to Ninth Circuit case law that holds that "mussel shells and mussel byproduct are not pollutants" under the Clean Water Act. *Ass'n to Protect Hammersley, Eld & Totten Inlets v. Taylor,* 299 F.3d 1007, 1016 (9th Cir.2002). The *Hammersley* court found the Clean Water Act to be "ambiguous on whether 'biological materials' means *all* biological matter regardless of quantum and nature." *Id.* While that case is distinguishable, we choose a more limited analysis.[6] We see our obligation not as defining the outermost bounds of "biological materials," but rather simply as deciding whether biological pesticides fit into the ordinary meaning of "biological materials."

The term "biological materials" cannot be read to exclude biological pesticides or their residuals. The EPA's Final Rule treats biological pesticides no

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[6] The *Hammersley* court based its conclusion on the fact that shells and shell byproduct of shellfish-farming facilities are the result of natural biological processes, not the result of a transforming human process. *See Hammersley,* 299 F.3d at 1016-17.

differently from chemical pesticides, exempting both from NPDES permitting requirements in certain circumstances. *See* 71 Fed. Reg. at 68,492. We find this interpretation to be contrary to the plain meaning of the Clean Water Act. In 33 U.S.C. § 1362, Congress purposefully included the term "biological materials," rather than a more limited term such as "biological wastes." Congress could easily have drafted the list of pollutants in the Clean Water Act to include "chemical wastes" and "biological wastes." But, here, the word "waste" does not accompany "biological materials." Thus, if we are to give meaning to the word "waste" in "chemical waste," we must recognize Congress's intent to treat biological and chemical pesticides differently.

This interpretation is consistent with the precedent of this Court and others. In *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir.1988), we determined that "[m]illions of pounds of live fish, dead fish and fish remains annually discharged in Lake Michigan by [a] facility are pollutants within the meaning of the [Clean Water Act], since they are 'biological materials.' " Likewise, the District Court of Maine determined that "salmon feces and urine that exit the net pens and enter the waters are pollutants as they constitute 'biological materials' or 'agricultural wastes.' " *United States Pub. Interest Research Group v. Atl. Salmon of Maine*, 215 F.Supp.2d 239, 247 (D.Me.2002) (citing *Higbee v. Starr*, 598 F.Supp. 323, 330-31 (D.Ark.1984) *aff'd*, 782 F.2d 1048 (8th Cir.1985)). Biological pesticides similarly must be considered "biological materials." Biological pesticides consist of artificial concentrations of viruses,

bacteria, fungi, plant materials, and/or other biological materials. *See* Pesticides: Glossary, U.S. EPA, *available at* http:// www. epa. gov/ pesticides/ glossary. Congress defined "pollution" as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). Adding biological pesticides to water undeniably alters its biological integrity. Therefore, we find biological pesticides to be "biological materials" under the Clean Water Act.

2. Are Chemical Pesticide Residuals Added to the Water by "Point Sources?"[7]

The EPA further defends its Final Rule by arguing that excess pesticide and residue pesticide are not discharged from a "point source." In other words, though excess and residue pesticides have exactly the same chemical composition and are discharged from the same point source at exactly the same time as the original pesticide, and though excess and residue pesticides would not enter the Nation's waterways but for the discharge of the original pesticide, the EPA concludes that excess and residue pesticides are not discharged from a "point source" because at the moment of discharge there is only pesticide. This

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[7] This analysis is not necessary for biological pesticides because, as discussed above, both biological pesticides and their residuals are pollutants under the Clean Water Act. Because biological pesticides are discharged from a "point source" they must be regulated under the Act.

is so, according to the EPA, because excess and residue pesticides do not exist until after the discharge is complete, and therefore "should be treated as a nonpoint source pollutant." 71 Fed. Reg. at 65,847.

The Clean Water Act defines "point source" as "any discernible, confined, and discrete conveyance," including a variety of mechanisms such as "container," "rolling stock," or "vessel or other floating craft." 33 U.S.C. § 1362(14). The EPA and the courts agree that pesticides are applied by point sources. *See* 71 Fed. Reg. at 65,847; *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1185 (9th Cir.2002); *Headwaters*, 243 F.3d at 528. The EPA argues that, at the time of discharge, the pesticide is a nonpollutant, and the excess pesticide and pesticide residues are not created until later, presumably after they are already in the water. Therefore, according to the EPA, pesticides at the time of discharge do not require permits because they are not yet excess pesticides or residue pesticides. But there is no requirement that the discharged chemical, or other substance, immediately cause harm to be considered as coming from a "point source." Rather, the requirement is that the discharge come from a "discernible, confined, and discrete conveyance," 33 U.S.C. § 1362(14), which is the case for pesticide applications.

The EPA offers no direct support for its assertion that a pesticide must be "excess" or "residue" at the *time of discharge* if it is to be considered as discharged *from a "point source."* This omission of authority is understandable, as none exists. The Clean Water Act does not create such a requirement. In-

stead, it defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The EPA's attempt at temporally tying the "addition" (or "discharge") of the pollutant to the "point source" does not follow the plain language of the Clean Water Act. Injecting a temporal requirement to the "discharge of a pollutant" is not only unsupported by the Act, but it is also contrary to the purpose of the permitting program, which is "to prevent harmful discharges into the Nation's waters." *Defenders of Wildlife,* 127 S.Ct. at 2525. If the EPA's interpretation were allowed to stand, discharges that are innocuous at the time they are made but extremely harmful at a later point would not be subject to the permitting program. Further, the EPA's interpretation ignores the directive given to it by Congress in the Clean Water Act, which is to protect water quality. As the EPA itself recognizes, "Congress generally intended that pollutants be controlled at the source whenever possible." 73 Fed. Reg. at 33,702 (citing S.Rep. No. 92-414, p. 77 (1972)). Here, it is certainly possible for pesticide residue to be controlled at its source because the discharge of the pesticide introduces such residue into the water.

The EPA's newly asserted temporal element also runs contrary to its own recent interpretation of the Clean Water Act's term "addition." *See* 73 Fed Reg. 33,697 (June 13, 2008). The EPA determined that transfers of water from one body of water to another do not constitute the "addition" of a pollutant to the new body of water, and in doing so clarified its understanding of the term "addition." 73 Fed Reg. 33,697. The EPA explained:

> Given the broad definition of "pollutant," transferred (and receiving) water will always contain intrinsic pollutants, but the pollutants in transferred water are already *in* "the waters of the United States" before, during, and after the water transfer. Thus, there is no "addition"; nothing is being added "to" "the waters of the United States" by virtue of the water transfer, because the pollutant at issue is already part of "the waters of the United States" to begin with.
>
> ....
>
> As noted above, EPA's longstanding position is that an NPDES pollutant is "added" when it is introduced into a water from the "outside world" by a point source. *Gorsuch*, 693 F.2d at 174-75.

Id. at 33,701. Given the EPA's understanding of "addition" of a pollutant as stated above, it is clear that under the meaning of the Clean Water Act, pesticide residue or excess pesticide-even if treated as distinct from pesticide-is a pollutant discharged from a point source because the pollutant is "introduced into a water from the 'outside world' by" the pesticide applicator from a "point source." *See id.* This interpretation coincides with the method of determining whether a discharge is from a "point source" that the Supreme Court recently cited with approval: "For an addition of pollutants to be from a point source, the relevant inquiry is whether-but for the point source-the pollutants would have been added to the receiv-

ing body of water." *Miccosukee,* 541 U.S. at 103, 124 S.Ct. 1537 (quoting *Miccosukee Tribe of Indians v. Florida Water Mgmt. Dist.,* 280 F.3d 1364, 1368 (11th Cir. 2002)). It is clear that but for the application of the pesticide, the pesticide residue and excess pesticide would not be added to the water; therefore, the pesticide residue and excess pesticide are from a "point source."

3. May the Final Rule Stand?

For all of these reasons, we conclude that the statutory text of the Clean Water Act forecloses the EPA's Final Rule. The EPA properly argues that excess chemical pesticides and chemical pesticide residues, rather than all chemical pesticides, are pollutants. However, the Final Rule does not account for the differences between chemical and biological pesticides under the language of the Clean Water Act. Further, because the Act provides that residual and excess chemical pesticides are added to the water by a "point source" there is no room for the EPA's argument that residual and excess pesticides do not require an NPDES permit. The "point source" from which the residue originates is easily discernable and necessarily must "be controlled at the source." *See* 73 Fed. Reg. at 33,702. Given all of the above in combination with the EPA's interpretation that "[p]oint sources need only convey pollutants into navigable waters to be subject to the Act," *id.* at 33,703, dischargers of pesticide pollutants are subject to the NDPES permitting program in the Clean Water Act. As such, the EPA's Final Rule cannot stand. Because the Clean Water Act's text bars the Final Rule we make no determination regarding the validity of the

issuance of the Final Rule under the APA, nor do we analyze the relationship between the Clean Water Act and the FIFRA.

CONCLUSION

For the foregoing reasons, Environmental Petitioners' petitions are **GRANTED** in part and **DENIED** in part, and Industry Petitioners' petitions are **DENIED** in whole. We **VACATE** the Final Rule.

APPENDIX B

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 06-4630, 07-3182, 07-3185, 07-3180, 07-3183, 07-3186, 07-3181, 07-3184, 07-3187.

The NATIONAL COTTON COUNCIL OF AMERICA, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellees.

FILED
AUG 3 2009
LEONARD GREEN, CLERK

Before: GUY, SUHRHEINRICH, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges on this court, and no judge of this court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green

Leonard Green
Clerk

APPENDIX C

CLEAN WATER ACT PROVISIONS

Clean Water Act § 101(a)(1), (d); 33 U.S.C. §§ 1251(a)(1), (d)

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter –

> (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
>
> * * *

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

Clean Water Act §§ 104(l)(1), (2), and (p); 33 U.S.C. §§ 1254(l)(1), (2), and (p)

§ 1254. Research, investigations, training, and information

(l) Collection and dissemination of scientific knowledge on effects and control of pesticides in water

(1) The Administrator shall, after consultation with appropriate local, State, and Federal agencies, public and private organizations, and interested individuals, as soon as practicable but not later than January 1, 1973, develop and issue to the States for the purpose of carrying out this chapter the latest scientific knowledge available in indicating the kind and extent of effects on health and welfare which may be expected from the presence of pesticides in the water in varying quantities. He shall revise and add to such information whenever necessary to reflect developing scientific knowledge.

(2) The President shall, in consultation with appropriate local, State, and Federal agencies, public and private organizations, and interested individuals, conduct studies and investigations of methods to control the release of pesticides into the environment which study shall include examination of the persistency of pesticides in the water environment and alternatives thereto. The President shall submit reports, from time to time, on such investigations to Congress to-

gether with his recommendations for any necessary legislation.

* * *

(p) Agricultural pollution

In carrying out the provisions of subsection (a) of this section the Administrator shall, in cooperation with the Secretary of Agriculture, other Federal agencies, and the States, carry out a comprehensive study and research program to determine new and improved methods and the better application of existing methods of preventing, reducing, and eliminating pollution from agriculture, including the legal, economic, and other implications of the use of such methods.

Clean Water Act § 208(b); 33 U.S.C. § 1288(b)

§ 1288. Areawide waste treatment management

(b) Planning process

(1) (A) Not later than one year after the date of designation of any organization under subsection (a) of this section such organization shall have in operation a continuing areawide waste treatment management planning process consistent with section 1281 of this title. Plans prepared in accordance with this process shall contain alternatives for waste treatment management, and be applicable to all wastes generated within the area involved. The initial plan prepared in accordance with such process shall be certified by

the Governor and submitted to the Administrator not later than two years after the planning process is in operation.

(B) For any agency designated after 1975 under subsection (a) of this section and for all portions of a State for which the State is required to act as the planning agency in accordance with subsection (a)(6) of this section, the initial plan prepared in accordance with such process shall be certified by the Governor and submitted to the Administrator not later than three years after the receipt of the initial grant award authorized under subsection (f) of this section.

(2) Any plan prepared under such process shall include, but not be limited to--

(A) the identification of treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the area over a twenty-year period, annually updated (including an analysis of alternative waste treatment systems), including any requirements for the acquisition of land for treatment purposes; the necessary waste water collection and urban storm water runoff systems; and a program to provide the necessary financial arrangements for the development of such treatment works, and an identification of open space and recreation opportunities that can be expected to result from improved water quality, including consideration of potential use of lands associated with treatment works and increased access to wa-

ter-based recreation;

(B) the establishment of construction priorities for such treatment works and time schedules for the initiation and completion of all treatment works;

(C) the establishment of a regulatory program to--

(i) implement the waste treatment management requirements of section 1281(c) of this title,

(ii) regulate the location, modification, and construction of any facilities within such area which may result in any discharge in such area, and

(iii) assure that any industrial or commercial wastes discharged into any treatment works in such area meet applicable pretreatment requirements;

(D) the identification of those agencies necessary to construct, operate, and maintain all facilities required by the plan and otherwise to carry out the plan;

(E) the identification of the measures necessary to carry out the plan (including financing), the period of time necessary to carry out the plan, the costs of carrying out the plan within such time, and the economic,

social, and environmental impact of carrying out the plan within such time;

(F) a process to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and their cumulative effects, runoff from manure disposal areas, and from land used for livestock and crop production, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

(G) a process to (i) identify, if appropriate, mine-related sources of pollution including new, current, and abandoned surface and underground mine runoff, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

(H) a process to (i) identify construction activity related sources of pollution, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

(I) a process to (i) identify, if appropriate, salt water intrusion into rivers, lakes, and estuaries resulting from reduction of fresh water flow from any cause, including irrigation, obstruction, ground water extraction, and diversion, and (ii) set forth procedures and methods to control such intrusion to the extent feasible where such procedures and

methods are otherwise a part of the waste treatment management plan;

(J) a process to control the disposition of all residual waste generated in such area which could affect water quality; and

(K) a process to control the disposal of pollutants on land or in subsurface excavations within such area to protect ground and surface water quality.

(3) Areawide waste treatment management plans shall be certified annually by the Governor or his designee (or Governors or their designees, where more than one State is involved) as being consistent with applicable basin plans and such areawide waste treatment management plans shall be submitted to the Administrator for his approval.

(4) (A) Whenever the Governor of any State determines (and notifies the Administrator) that consistency with a statewide regulatory program under section 1313 of this title so requires, the requirements of clauses (F) through (K) of paragraph (2) of this subsection shall be developed and submitted by the Governor to the Administrator for approval for application to a class or category of activity throughout such State.

(B) Any program submitted under subparagraph (A) of this paragraph which, in whole or in part, is to control the discharge or other placement of dredged or fill material into the navigable waters shall include the following:

(i) A consultation process which includes the State agency with primary jurisdiction over fish and wildlife resources.

(ii) A process to identify and manage the discharge or other placement of dredged or fill material which adversely affects navigable waters, which shall complement and be coordinated with a State program under section 1344 of this title conducted pursuant to this chapter.

(iii) A process to assure that any activity conducted pursuant to a best management practice will comply with the guidelines established under section 1344(b)(1) of this title, and sections 1317 and 1343 of this title.

(iv) A process to assure that any activity conducted pursuant to a best management practice can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the best management practice;

(II) change in any activity that requires either a temporary or permanent reduction or elimination of the discharge pursuant to the best management practice.

(v) A process to assure continued coordination with Federal and Federal-State water-related planning and reviewing processes, including the National Wetlands Inventory.

(C) If the Governor of a State obtains approval from the Administrator of a statewide regulatory program which meets the requirements of subparagraph (B) of this paragraph and if such State is administering a permit program under section 1344 of this title, no person shall be required to obtain an individual permit pursuant to such section, or to comply with a general permit issued pursuant to such section, with respect to any appropriate activity within such State for which a best management practice has been approved by the Administrator under the program approved by the Administrator pursuant to this paragraph.

(D) (i) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with the requirements of this section, the Administrator shall so notify the State, and if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(ii) In the case of a State with a program submitted and approved under this paragraph, the Administrator shall withdraw approval of such program under this subparagraph only for a substantial failure of the State to administer its program in accordance with the requirements of this paragraph.

Clean Water Act §§ 301(a), (b), and (e); 33 U.S.C. §§ 1311(a), (b), and (e)

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 13416, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved--

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the re-

quirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

> (B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,
>
> (C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2) (A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology

economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub. L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this

paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3) (A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

* * *

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

Clean Water Act §§ 303(c), (d), and (e); 33 U.S.C. §§ 1313(c), (d), and (e)

§ 1313. Water quality standards and implementation plans

* * *

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2) (A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses

of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on

biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved--

> (A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or
>
> (B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

> (1) (A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified

waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current

plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish, and wildlife.

(4) Limitations on revision of certain effluent limitations

(A) Standard not attained

For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained

For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

* * *

(e) Continuing planning process

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not later than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning process which is consistent with this chapter. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this chapter. The Administrator shall not approve any

State permit program under subchapter IV of this chapter for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 1311 and 1312 of this title.

Clean Water Act § 306(a)(1) and (2); 33 U.S.C. § 1316(a)(1) and (2)

§ 1316. National standards of performance

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

Clean Water Act § 309(b) and (d); 33 U.S.C. § 1319(b) and (d)

§ 1319. Enforcement

* * *

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

* * *

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, [FN1] or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

Clean Water Act §§ 319(a)(1)(A), (B), and (C); 33 U.S.C. §§ 1329(a)(1)(A), (B), and (C)

§ 1329. Nonpoint source management programs

(a) State assessment reports

(1) Contents

The Governor of each State shall, after notice and opportunity for public comment,

prepare and submit to the Administrator for approval, a report which—

(A) identifies those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of this chapter;

(B) identifies those categories and subcategories of nonpoint sources or, where appropriate, particular nonpoint sources which add significant pollution to each portion of the navigable waters identified under subparagraph (A) in amounts which contribute to such portion not meeting such water quality standards or such goals and requirements;

(C) describes the process, including intergovernmental coordination and public participation, for identifying best management practices and measures to control each category and subcategory of nonpoint sources and, where appropriate, particular nonpoint sources identified under subparagraph (B) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source; and

* * *

Clean Water Act §§ 402(a) and (b); 33 U.S.C. §§ 1342(a) and (b)

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program

and permits issued thereunder under subsection (b) of this section.

* * *

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

* * *

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

* * *

Clean Water Act § 501(a); 33 U.S.C. § 1361(a)

§ 1361. Administration

(a) Authority of Administrator to prescribe regulations

The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.

Clean Water Act § 502 §§ (6), (11), (12), and (14); 33 U.S.C. §§ 1362(6), (11), (12), and (14)

§ 1362 Definitions

Except as otherwise specifically provided, when used in this chapter:

* * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the

well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

* * *

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source. (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

Clean Water Act sect. 505(a), (f), and (g); 33 U.S.C. sect. 1365(a), (f), and (g)

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title. [FN1]

(g) "Citizen" defined

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT PROVISIONS

Federal Insecticide, Fungicide, and Rodenticide Act § 2(bb); 7 U.S.C. § 136(bb)

§ 136. Definitions

(bb) Unreasonable adverse effects on the environment

The term "unreasonable adverse effects on the environment" means (1) any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide, or (2) a human dietary risk from residues that result from a use of a pesticide in or on any food inconsistent with the standard under section 346a of Title 21. The Administrator shall consider the risks and benefits of public health pesticides separate from the risks and benefits of other pesticides. In weighing any regulatory action concerning a public health pesticide under this subchapter, the Administrator shall weigh any risks of the pesticide against the health risks such as the diseases transmitted by the vector to be controlled by the pesticide.

Federal Insecticide, Fungicide, and Rodenticide Act § 3(c)(5); 7 U.S.C. § 136a(c)(5)

§ 136a. Registration of pesticides

(c) Procedure for registration

(5) Approval of registration

The Administrator shall register a pesticide if the Administrator determines that, when considered with any restrictions imposed under subsection (d) of this section--

(A) its composition is such as to warrant the proposed claims for it;

(B) its labeling and other material required to be submitted comply with the requirements of this subchapter;

(C) it will perform its intended function without unreasonable adverse effects on the environment; and

(D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

The Administrator shall not make any lack of essentiality a criterion for denying registration of any pesticide. Where two pesticides meet the requirements of this paragraph, one should not be registered in preference to the other. In considering an application for the registration of a pesticide, the Administrator may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy. If a pesticide is found to be efficacious by any State under section 136v(c) of this title, a presumption is established that the Administrator shall waive data requirements pertaining to efficacy for use of the pesticide in such State.

Federal Insecticide, Fungicide, and Rodenticide Act § 12(a)(2)(G); 7 U.S.C. § 136j(a)(2)(G)

§ 136j. Unlawful acts

(a) In general

(2) It shall be unlawful for any person--

(G) to use any registered pesticide in a manner inconsistent with its labeling;

* * *

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[OW–2003–0063; FRL–8248–1] RIN 2040–AE79

Application of Pesticides to Waters of the United States in Compliance With FIFRA

AGENCY: Environmental Protection Agency (EPA).
ACTION: Final rule.

SUMMARY: Today, EPA is issuing a regulation stating that the application of a pesticide in compliance with relevant requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not require a National Pollutant Discharge Elimination System (NPDES) permit in two specific circumstances. The first circumstance is when the application of the pesticide is made directly to waters of the United States to control pests that are present in the water. The second circumstance is when the application of the pesticide is made to control pests that are over, including near, waters of the United States. This rulemaking is based on the Agency's interpretation of the definition of the term "pollutant" under the Clean Water Act (CWA) as not including such pesticides.

This final rulemaking replaces EPA's previously published Interim and Final Interpretive Statements on the Application of Pesticides to Waters of the United States in Compliance with FIFRA. EPA's Interpretive Statement, published February 1, 2005, described the Agency's inter-

pretation of the CWA with regard to the application of pesticides regulated under FIFRA that are applied to or over, including near, waters of the United States. On August 13, 2003, EPA provided public notice of and solicited public comment on an Interim Statement and incorporated that input into the Interpretive Statement. On February 1, 2005, EPA published the Interpretive Statement and proposed to codify its substance in EPA's NPDES regulations and solicited comment on that proposed action. Today's final rule is the result of this process.

DATES: These final regulations are effective on January 26, 2006.

ADDRESSES: EPA has established a docket for this action under Docket ID No. OW–2003–0063. All documents in the docket are listed online at *http://www.regulations.gov*. Although listed in the online docket, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material , is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either online or in hard copy at the Water Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Jeremy Arling, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–564– 2218, e-mail address: *arling.jeremy@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

You may be affected by this action if you apply pesticides to or over, including near, water. Potentially affected entities may include, but are not limited to:

Category	NAICS	Examples of potentially affected entities
Agriculture parties—General agricultural interests, farmers/producers, forestry, and irrigation	111 Crop Production	Producers of crops mainly for food and fiber including farms, orchards, groves, greenhouses, and nurseries
	113110 Timber Tract Operations	The operation of timber tracts for the purpose of selling standing timber
	113210 Forest Nurseries Gathering of Forest Products	Growing trees for reforestation and/or gathering forest products, such as gums, barks, balsam needles, rhizomes, fibers, Spanish moss, ginseng, and truffles
	221310 Water Supply for Irrigation	Operating irrigation systems
Pesticide parties (includes pesticide manufacturers, other pesticide users/interests, and consultants)	325320 Pesticide and Other Agricultural Chemical Manufacturing	Formulation and preparation of agricultural pest control chemicals
Public health parties (includes mosquito or other vector control districts and commercial applicators that service these)	923120 Administration of Public Health Programs	Government establishments primarily engaged in the planning, administration, and coordination of public health programs and services, including environmental health activities
Resource management parties (includes State departments of fish and wildlife, State departments of pesticide regulation, State environmental agencies, and universities)	924110 Administration of Air and Water Resource and Solid Waste Management Programs	Government establishments primarily engaged in the administration, regulation, and enforcement of air and water resource programs, the administration and regulation of water and air pollution control and prevention programs, the administration and regulation of flood control programs, the administration and regulation of drainage development and water resource consumption programs, and coordination of these activities at intergovernmental levels
	924120 Administration of Conservation Programs	Government establishments primarily engaged in the administration, regulation, supervision and control of land use, including recreational areas, conservation and preservation of natural resources, erosion control, geological survey program administration, weather forecasting program administration, and the administration and protection of publicly and privately owned forest lands. Government establishments responsible for planning, management, regulation and conservation of game, fish, and wildlife populations, including wildlife management areas and field stations, and other administrative matters relating to the protection of fish, game, and wildlife are included in this industry
Utility parties (includes utilities)	221 Utilities	Provide electric power, natural gas, steam supply, water supply, and sewage removal through a permanent infrastructure of lines, mains, and pipes
Other Parties	713910 Golf courses and country clubs	Golf course operators who have ponds for irrigation

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility is affected by this action, you should carefully examine the applicability criteria in 40 CFR 122.23. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. Background

A. Clean Water Act and the Federal Insecticide, Fungicide, and Rodenticide Act

Congress passed the Federal Water Pollution Control Act (1972), also known as the Clean Water Act (CWA), to "restore and maintain the chemical, physical, and biological integrity of the nation's waters" 33 U.S.C. 1251(a). The CWA prohibits the discharge of any pollutant by any person from a point source into a water of the United States, except in compliance with certain other provisions of the Act, including Section 402. 33 U.S.C. 1311(a). Section 402 in turn authorizes EPA to issue permits under the National Pollutant Discharge Elimination System (NPDES) permit program for such discharges. States may also issue NPDES permits if authorized to do so by EPA. 33 U.S.C. 1342(a) and (b).

NPDES permits under the CWA are required only for point source discharges of materials that are *pollutants* to waters of the United States. Section 502(6) of the CWA defines "pollutant" to mean:

> * * * dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water.

33 U.S.C. 1362(6).[1] In the more than 30 years that EPA has administered the CWA, the Agency has never issued an NPDES permit for the application of a pesticide to or over water to target a pest that is present in or over the water. Nor has the Agency ever stated in any general policy or guidance that an NPDES permit is required for such applications.

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[1] The remaining language of the definition of "pollutant" in Section 502(6) is as follows, and is not relevant to today's action: "The term does not mean (A) "sewage from vessels" within the meaning of Section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources."

EPA regulates the sale, distribution and use of pesticides in the United States under the statutory framework of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to ensure that when used in conformance with FIFRA labeling directions, pesticides will not pose unreasonable risks to human health and the environment. All new pesticides must undergo a rigorous registration procedure under FIFRA during which EPA assesses a variety of potential human health and environmental effects associated with use of the product.

Under FIFRA, EPA is required to consider the effects of pesticides on the environment by determining, among other things, whether a pesticide "will perform its intended function without unreasonable adverse effects on the environment," and whether "when used in accordance with widespread and commonly recognized practice [the pesticide] will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. 136a(c)(5). In performing this analysis, EPA examines the ingredients of a pesticide, the intended type of application site and directions for use, and supporting scientific studies for human health and environmental effects and exposures. The applicant for registration of the pesticide must provide data from tests done according to EPA guidelines. This process is discussed in more detail below.

Several courts have recently addressed the question of whether the CWA requires NPDES permits for pesticide applications. These cases have resulted in some confusion among the regulated community and other affected citizens about

the applicability of the CWA to pesticides applied to waters of the United States. In 2001, the U.S. Court of Appeals for the Ninth Circuit held in *Headwaters, Inc.* v. *Talent Irrigation District* (*Talent*) that an applicator of herbicides was required to obtain an NPDES permit under the circumstances before the court (described in detail in Section V.C. below). 243 F.3rd 526 (9th Cir. 2001). The *Talent* decision caused considerable concern and confusion among public health authorities, natural resource managers, and others who rely on pesticides regarding their potential obligation to obtain an NPDES permit when applying a pesticide consistent with FIFRA and particularly about the impact of such a requirement on accomplishing their mission of protecting human health and the environment.

In 2002, the Ninth Circuit in *League of Wilderness Defenders et al.* v. *Forsgren* (*Forsgren*) held that the application of pesticides to control gypsy moths in National Forest lands required an NPDES permit. 309 F.3d 1181 (9th Cir. 2002). The court in Forsgren did not analyze the question of whether the pesticides applied were pollutants, because it assumed that the parties agreed that they were. In fact, the United States expressly reserved its arguments on that issue in its brief to the District Court. Id. at 1184, n.2. The court instead analyzed the question of whether the aerial application of the pesticide constituted a point source discharge, and concluded that it did. Id. at 1185.

Since *Talent and Forsgren*, California, Nevada, Oregon, and Washington, all of which are

within the Ninth Circuit, have issued permits for the application of certain types of pesticides (e.g., products to control aquatic weeds and algae and products to control mosquito larvae). Other States have continued their longstanding practice of not issuing permits to people who apply pesticides to waters of the United States. These varying practices reflect the substantial uncertainty among regulators, the regulated community, and the public regarding how the Clean Water Act applies to pesticides that have been properly applied and used for their intended purpose.

The Ninth Circuit recently addressed the Clean Water Act's applicability to pesticide applications for a third time. In *Fairhurst* v. *Hagener*, the court held that pesticides applied directly to a lake in order to eliminate non-native fish species, where there are no residues or unintended effects, are not "pollutants" under the CWA because they are not chemical wastes. 422 F.3d 1146 (9th Cir. 2005).

Since *Talent* and *Forsgren*, other courts have addressed the applicability of the CWA's NPDES permit requirements to pesticide applications. In *Altman* v. *Town of Amherst (Altman)*, the Second Circuit vacated and remanded for further development of the record a District Court decision holding that the Town of Amherst was not required to obtain an NPDES permit to spray mosquitocides over waters of the United States. 47 Fed. Appx. 62, 67 (2nd Cir. 2002). The United States filed an amicus brief setting forth the Agency's views in the context of that particular case. In its opinion, the Second Circuit stated

that "[u]ntil the EPA articulates a clear interpretation of current law—among other things, whether properly used pesticides released into or over waters of the United States can trigger the requirement for NPDES permits * * *— the question of whether properly used pesticides can become pollutants that violate the CWA will remain open." *Id.* at 67.

B. Interim and Interpretive Statements

In August 2003, EPA first analyzed the applicability of the NPDES permit program to pesticide applications in an administrative context through an Interim Statement and Guidance. 68 FR 48385 (Aug. 13, 2003). The Interim Statement presented EPA's position on the two circumstances in which pesticides applied to waters of the United States consistent with all relevant requirements of FIFRA are not "pollutants" under the CWA and thus do not require an NPDES permit. Although the United States previously addressed issues related to the Interim Statement in several *amicus* briefs, including those filed in *Talent* and *Altman*, those briefs reflected the government's evaluation of the law in the context of specific factual situations, and did not result from deliberative consideration through an administrative process. As such, the amicus briefs did not represent EPA's legal position on the precise questions at issue in the Interim Statement or in today's regulation.

EPA solicited public comments on its interpretation of the term "pollutant" in the Interim Statement as it relates to certain pesticide applications. After considering the public comments,

EPA issued a final Interpretive Statement on January 25, 2005. EPA simultaneously published a notice of proposed rulemaking to incorporate the substance of the Interpretive Statement into EPA regulations and solicited public comment on the proposed rulemaking. 70 FR 5093 (Feb. 1, 2005). EPA has considered the comments received and is today taking final action on the proposed regulation. The final regulation is substantially similar to the proposed regulations, with certain modifications described below.[2]

III. Summary of the Final Rule

EPA is revising the NPDES permit program regulations to add a paragraph to the list of discharges in 40 CFR 122.3 that are excluded from NPDES permit requirements. Specifically, today's regulation excludes applications of pesticides to waters of the United States consistent with all relevant requirements under FIFRA in two specific circumstances as follows:

(1) The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic

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[2] On March 29, 2002, EPA issued an Interpretive Statement and Regional Guidance on the Clean Water Act's Exemption for Return Flows from Irrigated Agriculture, which clarified that the application of an aquatic herbicide consistent with the FIFRA labeling to ensure the passage of irrigation return flow is a nonpoint source activity not subject to NPDES permit requirements under the Clean Water Act. This regulation does not address the March 2002 guidance.

weeds, or other pests that are present in waters of the United States.

(2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; for example, when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over or near water for control of adult mosquitoes or other pests.

Pesticides applied under these circumstances are not pollutants and therefore are not subject to NPDES permitting requirements.

EPA's final rule is substantially similar to the rule proposed in February 2005. EPA has modified the proposed regulatory text only to clarify the types of pesticide applications covered in the second circumstance (those to control pests present over, including near, waters of the United States). Commenters raised concerns that the second circumstance, as written in the proposed rule, could be interpreted more broadly than the Agency intended (e.g. encompassing drift from terrestrial pesticide applications). The final rule clarifies that the applications in the second circumstance are those in which it is unavoidable that some of the pesticides will be deposited into water in order to effectively target the pests. In other words, EPA is clarifying in the final rule that the regulation encompasses only those applica-

tions to control pests over, including near, waters of the United States, where the pesticide necessarily must enter the water in order for the application to achieve its intended purpose. Thus, the applications must first be intended to control pests over (including near) a water of the United States. Second, it must be unavoidable that the pesticide enter the water in order to target such pests effectively. For example, EPA believes that wide-area forest canopy insecticide applications can result in deposition to streams and other waters of the U.S. which are either not visible to the aerial applicator or not possible to avoid given the location of aerial application, and that in such circumstances, it is unavoidable that the pesticide enter the water in order to effectively target pests living in the canopy. Likewise, mosquito adulticide applications can result in some pesticide product entering the water because adult mosquitoes generally live over and adjacent to waterbodies. Similarly, pesticide applications to control non-native plants which grow at the water's edge, such as purple loosestrife, are intended to be covered by this provision, because when targeting plants at the water's edge, it is unavoidable that some of the herbicide will enter the water. EPA notes that the clarifying language in § 122.3(h)(2) is not intended to impose any additional requirements on pesticide applications beyond relevant FIFRA requirements. In addition, it is not intended to address applications of pesticides to terrestrial agricultural crops.

IV. Discussion

Today's rulemaking implements EPA's interpretation of the CWA's definition of "pollutant"

with respect to certain applications of pesticides. Under the CWA, pollutant means:

* * * dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. 33 U.S.C. 1362(6).

The circumstances of pesticide applications covered under today's rule are limited to the two types of applications described above, when conducted in compliance with all relevant requirements of FIFRA. EPA considers "relevant requirements" of FIFRA to mean those FIFRA requirements that relate to water quality. For instance, violating a requirement that the person mixing the pesticide must wear protective clothing, while an unlawful act that can be enforced under FIFRA, is not related to the protection of water quality, and therefore not a relevant FIFRA requirement for purposes of today's regulation. However, a labeling provision that governs application rates, active ingredient concentrations and dilution requirements, buffer zones, application locations, intended targets, times of day, temperature or other application requirements, and thus concerns the amounts, concentrations, and viability of substances that may potentially end up in waters of the United States, is related to water quality. Relevant FIFRA requirements may appear in product labeling, FIFRA regulation, or other documents setting forth requirements applied pursuant to FIFRA.

The application of a pesticide from a point source to waters of the United States requires an NPDES permit only if it constitutes the discharge of a "pollutant" within the meaning of that term in the CWA. EPA has evaluated whether pesticides regulated under and applied consistent with relevant FIFRA requirements for the two circumstances previously described fall within the terms in the CWA's definition of "pollutant," and concludes that they do not. Pesticides are not dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt or industrial, municipal, and agricultural waste. See CWA section 502(6). In addition, as described below, the terms, "chemical waste" and "biological materials," also do not encompass the types of pesticide applications addressed in today's action.

First, such pesticides are not "chemical wastes." The term "waste" ordinarily means that which is "eliminated or discarded as no longer useful or required after the completion of a process." The New Oxford American Dictionary 1905 (Elizabeth J. Jewell & Frank Abate eds., 2001). Pesticides applied consistent with relevant FIFRA requirements are not "wastes" as that term is commonly defined—on the contrary, they are products that EPA has evaluated and registered for the purpose of controlling target organisms, and are designed, purchased, and applied to perform that purpose. See *Fairhurst* v. *Hagener*, 422 F.3d at 1150.

EPA also interprets the term "biological materials" not to include biological pesticides applied consistent with relevant FIFRA requirements. This interpretation is both reasonable and consistent with Congressional intent, and is supported by relevant case law. It is unlikely that Congress intended to include biological pesticides applied in the circumstances described in today's rule within the Clean Water Act's definition of "pollutant." To do so would mean that biological pesticides are pollutants, while chemical pesticides used in the same circumstances are not. Since biologically and chemically based pesticides applied consistent with relevant requirements adopted by EPA under FIFRA are both EPA-evaluated products, treating them differently under the Clean Water Act is not warranted. Moreover, at the time the Act was adopted in 1972, chemical pesticides were predominant. It is therefore not surprising that Congress failed to discuss whether biological pesticides were to be covered by the Act. The fact that more biological pesticides have been developed since passage of the Act in 1972 does not justify expanding the reach of the NPDES permit requirement when there is no evidence that Congress intended the CWA to regulate biological pesticides in a manner different from chemical pesticides. Finally, biological pesticides in use today are generally reduced-risk products that have a narrower range of potential adverse environmental effects compared to many chemical pesticides. For this reason it would not make sense, and would be inconsistent with the goals of the Clean Water Act, to discourage the use of biological pesticides by requiring applicators of these

products to obtain an NPDES permit when chemical pesticides have no such requirement.

In cases in which courts have found specific biological materials to be "pollutants" under section 502(6) the substances at issue were waste materials discharged from a point source. See *Concerned Area Residents for the Environment* v. *South view Farm*, 34 F.3d 114 (2d Cir. 1994) (liquid manure is solid waste, sewage, biological material, and agricultural waste and is therefore a pollutant); *USPIRG* v. *Atlantic Salmon*, 215 F.Supp. 2d 239, 247–49 (D. Maine 2002) (nonnative fish escaped from net pens and salmon feces and urine exiting net pens are biological materials; pharmaceuticals in excess salmon feed exiting net pens are chemical wastes), *National Wildlife Federation* v. *Consumers Power Co.*, 862 F.2d 580, 585 (6th Cir. 1988) (live fish, dead fish, and fish remains released from hydro-electric facility's turbine are biological materials), *U.S.* v. *Plaza Health Laboratories, Inc.*, 3 F.3d 643, 646 (2d Cir. 1993), *cert. denied* 114 S.Ct. 2764 (1994) (discarded vials of human blood are pollutants). In none of these cases, which were cited by commenters, did a court find that a product applied for its intended purpose consistent with applicable EPA requirements was a "biological material" and therefore a pollutant under the CWA.

The Ninth Circuit Court of Appeals in *Assn. to Protect Hammersley, Eld, and Totten Inlets (APHETI)* v. *Taylor Resources, Inc.*, 299 F.3d 1007, 1017 (9th Cir. 2002), cited to several of these cases as being in accord with its finding that "biological materials" means the waste product of a

human or industrial process. The APHETI court based its decision that mussel shells, mussel feces, and other materials emitted from mussels grown on harvesting rafts are not pollutants on the doctrine of *ejusdem generis*. The court found that the more specific terms in the CWA's definition of "pollutant" support an understanding of the more general term "biological materials" as waste material of a human or industrial process. *Id.* at 1015. The court went on to analyze Congress' intent in enacting the CWA and found that the purpose of the statute further supported such an interpretation of biological materials in that case. *Id.* at 1016.

Furthermore, EPA's interpretation that biological and chemical pesticides are not pollutants is reasonable because both types of pesticides must comply with FIFRA registration requirements. EPA reviews and evaluates these pesticides and authorizes their use, subject to the limitations and requirements of the EPA registration.

Today's action applies only to the specific categories of pesticide applications addressed in the text of the regulation. EPA notes that pesticides are waste materials, and therefore pollutants under the Act, when contained in a waste stream, including storm water regulated under section 402(p) or other industrial or municipal discharges. In those circumstances, an NPDES permit may be required if the pesticides are discharged into a water of the United States from a point source.

In addition, if there are residual materials resulting from pesticides that remain in the water after the application and its intended purpose (elimination of targeted pests) have been completed, these residual materials are also pollutants under CWA section 502(6) because they are wastes of the pesticide application. Such residuals include excess amounts of pesticide that do not reach a target organism and materials that remain after the application has completed its intended task. These materials are waste materials, as that term is commonly defined, because they are substances that are "no longer useful or required after the completion of a process." The New Oxford American Dictionary 1905, supra. See also *Fairhurst* v. *Hagener*, 422 F.3d 1146.

However, pesticide applications under the circumstances described above and consistent with FIFRA do not require NPDES permits, even if the application leaves residual materials which are "pollutants" under the Act in waters of the United States. Section 301(a) of the CWA prohibits the "discharge of any pollutant" except in compliance with certain other provisions of the Act. The CWA defines "discharge of a pollutant" to mean "any *addition* of any pollutant to navigable waters from *any point source*." Thus, at the time of discharge to a water of the United States, the material in the discharge must be both a pollutant, and from a point source. In this case, while the discharge of the pesticide is from a point source (generally a hose or an airplane), it is not a pollutant at the time of the discharge. The material added by a pesticide applicator to or over, including near, water is not a pollutant for the rea-

sons stated above. Even though the pesticide may become a "pollutant" at a later time (*e.g.*, after the pesticide product has served its intended purpose), a permit is not required for its application because it did not meet both statutory prerequisites (pollutant and point source) at the time of its discharge into the water. Instead, the residual should be treated as a nonpoint source pollutant, potentially subject to CWA programs other than the NPDES permit program (*e.g.*, listing and TMDL development pursuant to CWA section 303(d)).

Today's action does not address drift over and into waters of the United States from pesticide applications to land. As discussed below, EPA has established a multi-stakeholder workgroup under one of its federal advisory committees to explore policy issues relating to the terrestrial application of pesticides that may drift into aquatic environments. EPA also notes that today's discussion of the terms "chemical waste" and "biological materials" applies only for CWA purposes and is not intended to address the use of those terms or similar terms under any other statutes the Agency administers.

V. Public Comment

EPA first solicited comment on its interpretation of "pollutant" under the CWA with respect to certain pesticide applications on August 13, 2003. See 68 FR 48385 (Aug. 13, 2003). EPA provided a second opportunity for public comment on its interpretation when it proposed the regulation on which the Agency is today taking final action. See 70 FR 5093 (Feb. 1, 2005). EPA received many

comments on its interpretation during both comment periods, from a wide range of interested parties including pesticide manufacturers and applicators, public health control agencies, State agricultural agencies, State environmental agencies, environmental groups, human health advocates, farming interests, and other members of the public. Many commenters supported EPA's interpretation, while others opposed it as inconsistent with the CWA.

The record for today's action contains EPA's detailed responses to comments received during both public comment periods. See Docket ID No. OW–2003– 0063 at *http://www.regulations.gov.* EPA is providing a summary below of its responses to some of the significant comments received.

A. Scope of Regulation

Many of the commenters who supported EPA's proposed rule also recommended that EPA broaden the scope of the final rule to cover all pesticide applications, including agricultural applications over land, that are conducted in accordance with the relevant requirements of FIFRA. This final rule addresses only the following two circumstances described in the proposed rule: The application of aquatic pesticides directly to waters of the United States, and the application of pesticides to control pests over, including near, such waters.

In the meantime, EPA will continue to follow its long-standing practice of not requiring NPDES

permits for agricultural pesticide applications that are conducted in compliance with relevant FIFRA requirements. EPA is continuing to consider the applicability of the CWA to situations other than those EPA is addressing in today's action where pesticides applied in accordance with relevant FIFRA requirements may reach and enter waters of the United States, including drift of pesticides applied aerially over land. Therefore, EPA does not believe it is appropriate to broaden the scope of the regulation to include additional types of pesticide applications at this time.

To assist the Agency's consideration of these issues, EPA has established a workgroup under the existing Pesticide Program Dialogue Committee (PPDC) (an advisory committee chartered under the Federal Advisory Committee Act (FACA)) to address issues involving pesticide spray drift from agricultural and other applications. The goals of the workgroup are the following: (1) Improving understanding of the perspectives of all stakeholders regarding pesticide spray drift; (2) finding common ground for further work toward minimizing both the occurrence and potential adverse effects of pesticide spray drift; (3) developing options for undertaking work where common ground exists; and (4) exploring the extent of drift, even with proper usage, and the range and effectiveness of potential responses to unacceptable levels of off-target drift. The spray drift workgroup will provide advice to EPA through the PPDC.

The PPDC is a FACA-authorized forum for a diverse group of stakeholders to provide feedback to the Agency's pesticide program on various pesticide regulatory, policy, and program implementation issues. Topics of discussion at past meetings have included the disclosure of inert ingredients, registration review, nonanimal testing, antimicrobial pesticides, endangered species, reduced risk pesticides, labeling, minor uses, ecological standards, fees for service, experimental use permits, environmental marketing claims, outreach to the public, and several implementation issues emanating from the Food Quality Protection Act of 1996.

Members of the PPDC include representatives of environmental and public interest groups, pesticide manufacturers and trade associations, user and commodity groups, public health and academic institutions, federal and State agencies, and the general public. Participants in the Spray Drift workgroup reflect the range of stakeholder interests represented on the full PPDC, and also include members with backgrounds in water quality issues. By operating under the PPDC, the Spray Drift workgroup will comply with FACA procedural requirements including timely public notice of meetings, public access to meetings and opportunity for the public to comment; public availability of documents considered by the workgroup; and attendance of a federal officer or employee at each meeting.

B. Sufficiency of FIFRA to Address Water Quality Impacts of Pesticide Applications

Many commenters objected to the proposed rule on the basis that EPA's regulation of pesticides under FIFRA does not adequately protect water quality, and thus pesticide applications should require an NPDES permit. These commenters alleged both legal and policy shortcomings of FIFRA. They also asserted that EPA's interpretation is improper because FIFRA does not preempt CWA requirements and because EPA lacks authority to exempt categories of discharges from the CWA's prohibition against discharges without an NPDES permit.

These commenters may have misinterpreted the legal interpretation that provides the basis for today's action. First, EPA is not expressly or by implication repealing any provision of the CWA in today's action, nor is the Agency arguing that FIFRA registration preempts CWA section 301(a) or section 402(a). Moreover, EPA is not arguing that registration under FIFRA or compliance with FIFRA requirements replaces or satisfies an otherwise applicable requirement under the CWA to obtain an NPDES permit. Nor is EPA exempting from section 301(a) or section 402(a) any categories of pollutants, because the pesticide applications at issue here are not pollutants under the Act. The proscription in the CWA against discharging pollutants from point sources to waters of the United States except in compliance with section 402 continues to apply. Rather, EPA is exercising its authority to interpret a term in a statute it administers. EPA is clarifying that pesticides applied to or

over, including near, water for their intended purpose consistent with all relevant requirements under FIFRA in the circumstances specified in the rule are not, at the time of application, "pollutants" under the CWA, and therefore applications are not discharges required to obtain permits.

EPA's review, evaluation, and registration of pesticides used in these two circumstances further demonstrate that this is a reasonable interpretation, consistent with Congressional intent. EPA's regulatory programs under FIFRA provide support for the Agency's conclusion that the pesticides applied to or over, including near, water are not wastes (and therefore not pollutants) and serve as an indicator of when a pesticide is being applied as a product for its intended, beneficial purpose. Under FIFRA, EPA receives applications from people who wish to sell and distribute pesticides. The Agency may approve and issue a registration for a product if EPA determines that the product will not cause "unreasonable adverse effects on the environment," which is defined as "any unreasonable risk to man or the environment, taking into account the economic, social and environmental costs and benefits of the use of [a] pesticide * * *." FIFRA Section 3(c)(5). In other words, the Agency may register a pesticide only if the product provides economic, social, and environmental benefits that outweigh risks from its use. As part of FIFRA registration, EPA may establish requirements, which are typically contained in the label for the pesticide, to ensure that when used, it will not cause unreasonable adverse effects on the environment, including the aquatic environment. Thus, registration and use

of a pesticide in accordance with its approved labeling or other relevant FIFRA requirements indicates that a pesticide is a product intended to be used for a beneficial purpose that is authorized by EPA and is not a waste. For these reasons, comments regarding the adequacy of EPA's pesticide regulatory program do not pertain to the legal interpretation of whether a pesticide is a "chemical waste" or a "biological material" for purposes of the definition of "pollutant" under the CWA.

Nonetheless, it is important to note that EPA disagrees with commenters' concerns that EPA's registration process does not take into account local conditions, existing water quality standards and use designations, synergistic effects of multiple pesticides, inert ingredients, nontarget aquatic organisms, and the effect of multiple applicators in the same area. The regulatory and non-regulatory tools under FIFRA provide means of addressing water quality problems arising from the use of pesticides. In particular, the pesticide registration and re-registration processes consider impacts on both human health from the presence of pesticides in drinking water, and on aquatic resources (*e.g.*, fish, invertebrates, plants, and other species in fresh water, estuarine, and marine environments). EPA requires a pesticide company to submit a substantial body of data in support of an application for registration. EPA then supplements this required database with information obtained through a systematic search of the open literature on the ecotoxicity of environmental substances. EPA compares the estimated environmental concentrations expected to result

from use of a pesticide with toxicity values observed in required studies and studies from the open literature. This database provides sufficient information to conduct assessments of potential ecological and human health risks, including the identification of toxicologically significant degradation products and/or metabolites. For additional information on EPA's approach to ecological risk assessment in general, and endangered and threatened species in particular, see: *http://www.epa.gov/espp/consultation/ecorisk-overview.pdf.*

C. EPA's Interpretation of the Term "Pollutant" Under the CWA

Some commenters claimed that EPA's interpretation of the term "pollutant" is inconsistent with the Clean Water Act, with relevant case law, or with prior Agency statements. EPA disagrees with the commenters and believes its interpretation of the term "pollutant" is reasonable and consistent with the language and legislative intent of the Clean Water Act. As described above, pesticides applied in the circumstances addressed in today's regulation, in compliance with FIFRA, for their intended purpose, are not pollutants under the Act. EPA also disagrees with commenters that the term "biological materials" can only be read to include biological pesticides applied in the circumstances addressed by today's regulation—i.e., application to or over waters of the United States consistent with relevant requirements of FIFRA. EPA's analysis of the terms "chemical waste" and "biological materials" in the circumstances ad-

dressed by today's regulation is described in more detail above.

In addition, the Ninth Circuit Court of Appeals recently held that pesticides that do not generate a residue when applied directly to a lake to eliminate a non-native fish species are not "pollutants" under the CWA because they are not chemical wastes. *Fairhurst* v. *Hagener*, 422 F.3d 1146 (9th Cir. 2005). In so holding, the court considered the plain meaning of the term "chemical waste" and noted that its analysis was in accord with EPA's interpretation of the term in its July 2003 Interim Statement, and that EPA's interpretation is "reasonable and not in conflict with the expressed intent of Congress." *Id.* at 1149–50. Today's regulation is based on the same interpretation EPA first articulated in the Interim Statement, and is consistent with the *Fairhurst* court's holding.

Moreover, EPA's interpretation is not inconsistent with *Talent* and *Forsgren* as some commenters have asserted. As explained below, these cases do not interpret the term "pollutant" as including the pesticide applications addressed in today's rule.

In *Headwaters* v. *Talent*, the Ninth Circuit reversed the District Court's dismissal of a CWA citizen suit against an irrigation district alleging that application of the herbicide Magnacide H to irrigation canals to control aquatic weeds and vegetation required an NPDES permit. The District Court had concluded that the application of the pesticide was adequately regulated under

FIFRA, and further regulation under the CWA was unnecessary. *Headwaters* v. *Talent*, No. 98–6004–AA slip op. at 12 (D. Orc. Feb. 1, 1999). The Ninth Circuit found that residual from the application of Magnacide H was a pollutant in this case and that registration of the herbicide under FIFRA did not preclude applicability of the CWA. *Headwaters* v. *Talent*, 243 F.3d at 532. This conclusion is consistent with EPA's interpretation. As described above, EPA agrees that residual materials from pesticide applications are "pollutants" under the Act. In addition, the irrigation district in *Talent* failed to comply with a FIFRA registration requirement to contain the herbicide-laden water in an irrigation canal for a specified number of days. EPA's interpretation codified in today's action is that pesticides applied in the circumstances described in the rule are not "pollutants" where they are applied consistent with relevant FIFRA requirements. Thus, EPA's interpretation is consistent with the result reached by the *Talent* court.

In *League of Wilderness Defenders* v. *Forsgren*, the Ninth Circuit held that the aerial application of insecticides over National Forest lands in Washington and Oregon to control a predicted outbreak of the Douglas fir tussock moth required an NPDES permit. However, the court in Forsgren stated incorrectly that the parties in the case did not dispute that the insecticides met the CWA definition of "pollutant." *League of Wilderness Defenders* v. *Forsgren*, 309 F.3d at 1184, n.2. In fact, the Forest Service in its brief before the District Court reserved its arguments on that particular issue. Because the Ninth Circuit errone-

ously assumed that the question of whether the applications were pollutants was not in dispute, it did not analyze the issue but simply stated that they were. *Id.* at 1185. The issue that the *Forsgren* court did analyze in detail was whether the airplanes from which the insecticides were sprayed are point sources under the CWA—a different issue from that addressed in today's interpretation.[3]

Commenters also claimed that EPA's interpretation is inconsistent with the Clean Water Act because the purpose for which a pesticide is applied is not relevant to the question of whether it is a pollutant under the Act. The commenters pointed primarily to two cases—*Hudson River Fisherman's Assn.* v. *City of New York*, 751 F.Supp. 1088 (S.D.N.Y.), aff'd., 940 F.2d 649 (2d Cir. 1991), and *Minnehaha Creek Watershed District* v. *Hoffman*, 597 F.2d 617 (8th Cir. 1979)—as supporting their assertion. However, both these cases are distinguishable from EPA's interpretation.

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[3] EPA's General Counsel issued a memorandum on September 3, 2003, addressing the Agency's views on the effect of the *Forsgren* decision. Specifically, EPA stated that it did not acquiesce outside the Ninth Circuit with the court's decision regarding the application of EPA regulation defining "silvicultural point source" at 40 CFR 122.27(b)(1), and would continue to follow its longstanding interpretation of the statute and these regulations. Memorandum from Robert E. Fabricant to Regional Administrators, "interpretive Statement and Guidance Addressing Effect of Ninth Circuit Decision in *League of Wilderness Defenders* v. *Forsgren* on Application of Pesticides and Fire Retardants," Sept. 3, 2003.

In *Minnehaha Creek*, the court was interpreting the terms "rock, sand, [and] cellar dirt" in the definition of "pollutant" in CWA Section 502(6). The federal appellants in that case appealed a District Court decision finding that the U.S. Army Corps of Engineers did not have jurisdiction under CWA Section 404 over the placement of riprap and the construction of dams in Minnehaha Creek and adjacent Lake Minnetonka. The District Court's decision was based on its conclusion that the creek and the lake were not navigable waters of the United States and that while the riprap and construction materials were "rock and sand," the activities at issue in the case were not within the purview of the Act because they did not significantly affect water quality. *Minnehaha Creek Watershed District* v. *Hoffman*, 449 F.Supp 876, 886 (D. Minnesota 1978). The Eighth Circuit disagreed and held that a significant alteration in water quality need not be demonstrated for a substance to be a pollutant. *Minnehaha Creek Watershed District* v. *Hoffman*, 597 F.3d at 626–27.

The Eighth Circuit stated in Minnehaha Creek that it found "no justification in the District Court's determination that whether the discharge of a particular substance *listed in s[ection] 502(6)* constitutes the discharge of a 'pollutant' under the Act depends upon the purpose for which the discharge is made." *Id.* at 627, emphasis added. EPA notes that nowhere in its opinion does the District Court reach such a conclusion. In any case, EPA is not concluding that the question of whether a substance is a pollutant depends on the specific purpose for which it is discharged. Rather, EPA

is interpreting what specific terms in section 502(6) mean in the context of certain pesticide applications.

The Second Circuit Court of Appeals decision in *Hudson River Fishermen's Assn.* v. *City of New York* is also distinguishable from the circumstances addressed in today's rule. In that case, the District Court held that discharges of chlorine and aluminum sulfate (alum floc) from an aqueduct into a reservoir were discharges of pollutants requiring an NPDES permit. First, this case involved the discharge of alum floc from a point source at a point when it was a "chemical waste" and, therefore, consistent with EPA's interpretation, properly constituted a pollutant under the statute. *Hudson River Fishermen's Assn.* v. *City of New York*, 751 F.Supp 1088, 1102. In contrast, today's rule addresses certain pesticides which are being applied in compliance with relevant FIFRA requirements and, for the reasons described above, are not pollutants.

Moreover, the court's holding that chlorine was a pollutant also referred to the chlorine in the aqueduct at the time it discharged into the reservoir, not at the time it was first added to the water. The court held that the chlorine was a pollutant, no matter how useful it may earlier have been, citing to the Eighth Circuit's decision in *Minnehaha Creek*. *Id.* at 1101. Similarly, EPA is not concluding that the question of whether substances listed in section 502(6) are pollutants depends on the purpose for which they are discharged. Rather, EPA is interpreting what specific terms in section 502(6) (terms other than

those addressed in *Minnehaha Creek*) mean in the context of these two types of pesticide applications.

Finally, while EPA's interpretation is not inconsistent with either *Hudson River* or *Minnehaha Creek*, it is further supported by the Ninth Circuit's decision in *Fairhurst* v. *Hagener*. In *Fairhurst*, the Ninth Circuit specifically considered the purpose for which the pesticide was applied—the same factor commenters claim is not relevant under *Hudson River* and *Minnehaha Creek*— and the fact that it was applied consistent with the product's FIFRA label, in concluding that it was not a pollutant under the CWA. *Fairhurst* v. *Hagener*, 422 F.3d 1146, 1150 ("Because intentionally applied and properly performing pesticides are not 'pollutants,' a potential discharger is not required to secure an NPDES permit for such pesticides before discharge.")

Some commenters also claimed that EPA's interpretation is inconsistent with positions taken by the government in several *amicus curiae* briefs related to the issues addressed by the interpretation. As mentioned above, these briefs reflected the government's evaluation of the law in the context of the specific factual situations at issue and did not result from the deliberative consideration through an administrative process, as today's rule does. As such, the briefs were not a comprehensive statement of EPA's legal position on the precise questions addressed in today's rule, nor did they reflect the exercise of EPA's legal and policy judgment after consideration of public comments. See Memorandum from Ann R. Klee to Ben-

jamin Grumbles and Susan Hazen, "Analysis of Previous Federal Government Statements on Application of Pesticides to Waters of the United States in Compliance with FIFRA," Jan. 24, 2005.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action." Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This rule merely identifies two circumstances in which the application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires an NPDES permit under the Clean Water Act.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop,

acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business based on Small Business Administration (SBA) size standards at 13 CFR

121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Because EPA is identifying two circumstances in which the application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the Clean Water Act, this action will not impose any requirement on any small entity.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of UMRA

generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost- effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reason, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's

rule is not subject to the requirements of section 203 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. EPA is merely identifying two circumstances in which the application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the Clean Water Act. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communi-

cations between EPA and State and local governments, EPA specifically solicited comment on the proposed rule from State and local officials. EPA additionally consulted with state officials in the development of the final rule. Especially important were consultations regarding the manner in which States in the Ninth Circuit currently permit pesticides in response to the *Talent* decision and how states use TMDLs and other authorities to address pesticide residuals.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

This final rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. EPA is

merely identifying two circumstances in which the application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the Clean Water Act. Thus, Executive Order 13175 does not apply to this rule. Moreover, in the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicited comment on the proposed rule from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This regulation is not subject to Executive Order 13045 because it is not economically significant as defined under Executive Order 12866 and because the Agency does not have reason to believe the environmental health and safety risks

addressed by this action present a disproportionate risk to children. The regulation only interprets the legal scope of the NPDES permit requirement under the CWA and does not change how pesticide applications are addressed under FIFRA.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)). The only effect of this rule is to identify two circumstances in which the application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the Clean Water Act.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standard bodies. The NTTAA directs EPA to provide Congress, through

OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rulemaking does not involve technical standards.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective January 26, 2007.

List of Subjects in 40 CFR Part 122

Environmental protection, Administrative practice and procedure. Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

Dated: November 20, 2006.
Stephen L. Johnson,
Administrator.

■ For the reasons set forth in the preamble, chapter I of title 40 of the Code of Federal Regulations is to be amended as follows:

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

■ 1. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 2. Section 122.3 is amended by adding paragraph (h) to read as follows:

§ 122.3 Exclusions.

* * * * *

(h) The application of pesticides consistent with all relevant requirements under FIFRA (i.e., those relevant to protecting water quality), in the following two circumstances:

(1) The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds, or other pests that are present in waters of the United States.

(2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, where a por-

tion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; for example, when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over or near water for control of adult mosquitoes or other pests.

[FR Doc. E6-20002 Filed 11-24-06; 8:45 am]
BILLING CODE 6560-50-P

APPENDIX D

No. 06-4630 (and consolidated cases)

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

The NATIONAL COTTON COUNCIL OF AMERICA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of Final Action of the United States Environmental Protection Agency

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RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR STAY OF MANDATE

JOHN C. CRUDEN
Acting Assistant Attorney General

ALAN D. GREENBERG
Attorney, U.S. Department of Justice
Environmental & Natural Resources Division

1961 Stout St. – 8th Floor
Denver, CO 80294
(303) 844-1366

Of Counsel:
MINDY NIGOFF
U.S. Environmental Protection
Agency

April 9, 2009 Washington, DC 20460

TABLE OF CONTENTS

[OMITTED]

TABLE OF AUTHORITIES

[OMITTED]

INTRODUCTION

Respondents U.S. Environmental Protection Agency and Lisa P. Jackson (collectively, "EPA") move, in accordance with Fed. R. App. P. 41(d), for a stay of the mandate in this case until April 9, 2011.[1] EPA seeks this stay to avoid significant disruption to EPA and the 46 states that, along with the U.S. Virgin Islands, administer the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") permit programs. EPA also seeks this stay to avoid significant disruption among the hundreds of thousands of persons and businesses nationwide who apply pesticides to, over, or near waters of the United States without NPDES permits and now, as a result of this Court's decision, will need to obtain permits in order to continue doing so consistent with the Clean Water Act. The affected pesticide applicators include local government entities that spray to and over waters to control mosquitoes, farmers who apply pesticides to eradicate aquatic pests, foresters who aerially spray over waters to prevent outbreaks of timber pests, and the U.S. Coast Guard, which sprays to kill insects that interfere with the maintenance of navigation devices. As a result of this Court's decision, almost all of these pesticide applications will likely be illegal under the Clean Water Act unless and until

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[1] EPA previously moved for an extension of time in which to file a petition for rehearing. On February 25, 2009, the Court granted EPA's motion for an extension to April 9, 2009. EPA has decided not to seek rehearing of the Court's decision in this case. Instead, EPA requests through this motion a stay of issuance of the mandate until April 9, 2011.

EPA and the non-federal permitting authorities issue NPDES permits that authorize and regulate pesticide applications consistent with the requirements of the Clean Water Act. EPA has already received numerous inquiries from States and pesticide applicators asking how they should proceed if permits covering the application of pesticides to, over, or near waters of the United States are not issued prior to the issuance of the mandate.

Neither EPA nor the non-federal NPDES permitting authorities currently have in place permits capable of addressing the many pesticide applications affected by this Court's decision. These permitting authorities do not have the resources to immediately process and issue thousands of individual permits for each person who now needs a NPDES permit for a pesticide application to, over, or near a water of the United States. As a result, EPA intends to issue (and anticipates that the States will issue) general NPDES permits to address these applications of pesticides. EPA and authorized States issue general permits to address a large number of similarly situated dischargers in lieu of issuing individual permits to each discharger. Both the Environmental Petitioners and this Court referred to the potential use of general permits as a means to allow uses of aquatic pesticides. Environmental Petitioners' Opening Brief at 57-60; *Nat'l Cotton Council v. EPA*, 553 F.3d 927, 930-3 1 (6th Cir. 2009).

The issuance of general permits, however, takes time. The development of a general permit for pesticide pollutant discharges will require in-depth environmental and engineering analyses. EPA must identify the types of pesticides and applications that

require permit coverage, and it must develop permit conditions sufficient to meet Clean Water Act requirements. EPA must give public notice of a draft permit, provide for public comment, and respond to those public comments prior to issuing the permit. EPA also plans to work with nonfederal permitting authorities to assist them in developing their own NPDES general permits. In addition, EPA and the non-federal permitting authorities must inform and educate the regulated community, who will need to conform their practices to the permits' requirements after it is issued. As explained in this motion, EPA estimates this administrative process – development, proposal and issuance of general permits – will take two years.

Until the issuance of appropriate general permits, affected people and businesses will not likely be able to obtain permit coverage for the application of pesticides to, over, or near waters of the United States. Thus, probably for the next 24 months, thousands of pesticide applicators face the unpalatable choice of either not applying pesticides to, over, or near waters of the United States or facing the involving risk of citizen suits and enforcement actions for discharging pesticides without a NPDES permit. To avoid the disruption to permitting authorities, mosquito abatement programs, farmers, foresters, and others, EPA requests the Court to exercise its equitable discretion and stay its mandate until April 9, 2011 to allow EPA and authorized permitting authorities sufficient time to develop and issue Clean Water Act permits containing appropriate terms to govern the discharge of pesticide pollutants to waters of the United States.

BACKGROUND

Since the enactment of the Clean Water Act in 1972, EPA has not required persons applying pesticides directly to or over waters of the United States for the purpose of controlling pests in or over those waters to obtain a NPDES permit.[2] See 71 Fed. Reg. 68,483, 68,484 (Nov. 27, 2006). In 2006, EPA issued a final rule titled "Application of Pesticides to Waters of the United States in Compliance with FIFRA," 71 Fed. Reg. 68,483 (Nov. 27, 2006).[3] Under this rule, which was challenged by petitioners in this case, EPA identified two circumstances in which the application of pesticides consistent with all relevant requirements under FIFRA to or over, including near, waters of the United States is not the discharge of a pollutant and, therefore, does not require an NPDES permit. *Id.* at 68,485.

On January 7, 2009, the Court issued an opinion granting in part and denying in part the

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[2] The Court, in its opinion, referenced pesticide labels in use for over 30 years that stated that the pesticide could not be discharged into water bodies unless in accordance with an NPDES permit. *Nat'l Cotton Council*, 553 F.3d at 931. This labeling requirement addressed pesticides present in waste streams, not the application of pesticides to target pests. Further, although pesticides in return flows from irrigated agriculture or in agricultural storm water discharges may be pollutants in certain circumstances, Congress expressly excluded these discharges from NPDES permitting requirements. 33 U.S.C. § 1342(l)(1) (prohibition on requiring a Clean Water Act permit for discharges composed entirely of return flows from irrigated agriculture); § 1362(14) (defining point source not to include agricultural storm water discharges).

[3] "FIFRA" is the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136, *et seq.*

environmental petitioners' petitions for review and denying the industry petitioners' petitions. *Nat'l Cotton Council*, 553 F.3d at 940. The Court found EPA's interpretation of the statutory terms "pollutant" and "point source" contrary to the text of the Clean Water Act. *Id.* at 935-40. It held that "dischargers of pesticide pollutants are subject to the NPDES permitting program in the Clean Water Act." *Id.* at 940. The Court vacated EPA's rule. *Id.*

LEGAL ARGUMENT

A. This Court Has Discretion to Stay the Mandate to Avoid Disrupting Regulatory Programs and the Regulated Community.

A court of appeals that finds an agency rule contrary to law and vacates the agency rule may stay its mandate to allow the agency to take additional regulatory action to avoid substantial disruption to the regulated program and the regulated community. *See Chamber of Commerce v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006) (staying mandate for 90 days to allow SEC to address matter and avoid substantial disruption of mutual fund industry); *Independent U.S. Tanker Owners v. Dole* , 809 F.2d 847, 854-55 (D.C. Cir. 1987) (withholding mandate for six months to allow agency to undertake further proceedings and avoid further disruption of domestic shipping market). When considering whether to stay the mandate, courts examine the "seriousness of the order's deficiencies and the disruptive consequence of an interim change that may itself be changed." *Allied Signal v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

The Ninth Circuit Court of Appeals, in a case presenting nearly identical vacatur issues to the one before this Court, recently affirmed a district court decision that postponed vacatur of a Clean Water Act permitting exclusion for 24 months to provide time for EPA to issue appropriate NPDES permits. *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006, 1010 (9th Cir. 2008). The district court in *Northwest Environmental Advocates* considered a challenge to an EPA regulation that excluded certain vessel discharges from NPDES permit requirements. *Id.* The district court found that the discharges of pollutants, including ballast water, from non-military vessels must occur only under the regulation of an NPDES permit. *Id.* Rather than vacating the regulation immediately, however, the district court ordered the regulatory exemption vacated no later than a date two years after issuance of its order. *Id.* at 1025-26.

The district court's analysis supporting a delay in vacating the rule, quoted and affirmed by the Ninth Circuit, is of particular relevance to this case. The district court recognized that an immediate vacatur of a regulatory structure that had stood for over 30 years was a practical impossibility. *Id.* at 1026. Thus, the district court framed its task as balancing the need for prompt action to address environmental harm "against the need to allow EPA adequate freedom to address a complicated issue." *Id.* at 1026. The district court also recognized that EPA has an expertise in the area that the court cannot approach. *Id.* Although the district court found the regulation excluding vessel discharges from NPDES permitting requirements inconsistent with the Clean Water Act, the court sought to avoid the significant harm to shipping and the economy if ballast water

could not be discharged from vessels without a permit and no permits were available to authorize the discharges. *Id.* at 1026-27. The district court and court of appeals recognized the substantial task presented to EPA - to "bring discharges previously exempted by § 122.3(a) within the permitting process of the CWA." *Id.* at 1026. The Ninth Circuit therefore affirmed the district court's decision to withhold vacating the rule for 24 months to provide appropriate time to EPA to address permitting issues. For the reasons set forth in the next section, this Court should withhold its mandate for a similar period.

B. This Court Should Stay Its Mandate Until April 9, 2011, to Enable EPA and the Authorized States to Issue General Permits to Regulate Discharges of Pesticide Pollutants To, Over, or Near Waters of the United States.

Unless stayed, this Court's mandate will effectively prohibit for many months the discharge of almost all pesticides to, over, or near waters of the United States. Because the Court determined that all biological pesticides are pollutants under the Act, the application of all biological pesticides to, over, or near waters of the United States will be illegal unless applied in accordance with a NPDES permit. *Nat'l Cotton Council*, 553 F.3d at 937-38. In addition, because virtually all applications of chemical pesticides leave pesticide pollutants in the form of excess or residual quantities, almost all applications of chemical pesticides to, over, or near waters will now require NPDES permits. *Id.* at 938-40. There is not currently in place a Clean Water Act general permit for all pesticide applications ad-

dressed by this Court's decision, and the individual permitting option is not a practical avenue at this time. In short, the removal of the exclusion for pesticide discharges creates the same regulatory dilemma that existed in the context of vessel discharges. A similar judicial response is appropriate.

As explained in the next section, an immediate vacatur of the Rule would have significant disruptive consequences to the NPDES permitting programs of EPA and the 47 non-federal permitting authorities responsible for regulating discharges of pollutants. In the following section, EPA explains that, until the permitting authorities establish appropriate permitting programs, the vacatur of the rule will have significant disruptive consequences to public health and welfare by limiting the application of pesticides to control mosquitoes, agricultural pests, invasive species and other undesired animals and plants.

1. The Disruptive Consequences to Permitting Authorities Requires a Stay of the Mandate.

Although the rule the Court vacated had only been in place since 2006, the rule codified what had been EPA's practice during the more than 35 years EPA has administered the Clean Water Act. During that time, EPA has never issued a single NPDES permit for pesticide applications to or over waters of the United States to target pests in or over the water. *See* 71 Fed. Reg. at 68,484; *Gem County Mosquito Abatement Dist. v. EPA*, 398 F. Supp. 2d 1, 5 (D.D.C. 2005). Similarly, the 47 non-federal permitting authorities have not issued permits for

pesticide applications to or over waters of the United States except in limited cases, primarily in response to recent litigation. Because of this Court's opinion, however, EPA and the non-federal authorities must now issue either individual permits or general permits for pesticide pollutant discharges to allow and regulate appropriate applications of pesticides to, over, or near waters of the United States. Vacatur of the rule prior to the issuance of permits will have significant disruptive consequences to the regulatory program.

The use of individual permits to authorize the hundreds of thousands of discharges of pesticide pollutants to waters of the United States that occur annually does not offer a feasible approach. Individual permits are issued based upon the permittee submitting a permit application. The permitting authority must then evaluate appropriate terms and conditions to comply with relevant technology-based effluent limits and applicable water quality standards, prepare a draft permit and accompanying fact sheet that contains the rationale for the permit conditions, and provide public notice and a public comment period of at least 30 days. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1311(b)(2)(A); 40 C.F.R. §§ 122.44(d); 124.6, 124.8. 124.10(b). If a State is the permitting authority, a proposed individual permit must then be sent to EPA, which may make comments, objections or recommendations for up to an additional 90 days. 40 C.F.R. § 123.44.

Requiring individual permits for all applicators of pesticides to, over, or near waters of the United States would seriously disrupt NPDES programs. The permitting authorities cannot handle the addition of pesticide applicators to the individ-

ual permit program. Nationally, approximately 45,700 facilities are authorized to discharge under individual permits. Declaration of James A. Hanlon, attached as Exhibit 1, ("Hanlon Decl.") ¶ 11. EPA estimates that 365,000 pesticide applicators perform approximately 5.6 million pesticide applications annually to, over, or near waters of the United States to control pests such as mosquitoes and gypsy moths, combat algae, weeds and other undesirable vegetation and attack invasive species such as zebra mussels. *Id.* ¶ ¶ 4, 5. Including these dischargers in the individual permit programs would increase these programs by a factor of eight. In addition, the consideration and issuance of an individual permit typically takes many months. This delay could effectively result in a denial of coverage in many cases because the need for pesticide applications often cannot be anticipated months in advance. *Id.* ¶ *6; see* Declaration of Teung F. Chin, PhD, attached as Exhibit 2, ("Chin Decl.") ¶¶ 2, 6-7, 10-11. Thus, the addition of potentially hundreds of thousands of individual permit applications from pesticide applicators would likely overwhelm permit authorities and prove ineffective in providing timely authorizations.

A general permit system does not offer a short-term solution to the permit coverage dilemma. Where there are a large number of similarly situated dischargers, EPA may issue a general permit covering a category of dischargers in lieu of issuing individual permits to each discharger. 40 C.F.R. § 122.28; *see South Florida Water Management District v. Miccosukee Tribe of Indians, et al.*, 124 S.Ct. 1537, 1545 at Fn * (2004) (recognizing the role EPA's general permits serve in reducing administrative burdens).

The procedures required for issuing a general permit, however, require a significant commitment of time and resources. Like individual permits, general permits must contain conditions necessary to meet Clean Water Act requirements. 40 C.F.R. §§ 122.44(a), (d).[4] The permitting authority prepares a fact sheet that includes a basis for the draft permit conditions. 40 C.F.R. § 124.8. The permitting authority must give the public notice of the draft permit and provide at least 30 days for public comment. 40 C.F.R. § 124.10(b). Any interested person may submit written comments on the draft permit and may request a public hearing. 40 C.F.R. § 124.11. The permitting authority must issue a response to comments when it issues the final permit. 40 C.F.R. § 124.17; *see* 40 C.F.R. § 122.28(b)(1) (general permits may be issued in accordance with the applicable requirements of Part 124).

For the reasons set forth in Mr. Hanlon's declaration, EPA estimates that the critical steps required to issue a general permit to cover applications of pesticide pollutants to, over, or near waters of the United States will take an additional 24 months. Hanlon Decl., ¶¶ 7, 18-36. EPA commenced the general permit process upon issuance of this Court's opinion in January, when it started an initial review of available data associated with potential pesticide point sources. *Id.* ¶¶ 4, 21. EPA also commenced review of existing state pesticide permits. *Id.* ¶ 21. EPA is working to identify the different types of pesticide applications to, over, or

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[4] The process for issuing a general permit and individual permit are generally the same; however, an individual permit requires a public notice period for each permit.

near waters of the United States, and the number and frequency of these applications. *Id.* This includes examining the different methods of pesticide applications and identifying best management practices that applicators employ to minimize the amount of pesticides that enters the water. *Id.* This analysis potentially forms the basis of the required technology-based effluent limitations for the different categories of pesticide applications that would be covered under a general permit. *Id.* Because EPA has not previously developed effluent limitation guidelines for the direct application of pesticides, EPA must develop such effluent limitations based upon its best professional judgment using the appropriate levels of controls (*e.g.*, best practicable control technology) established in the Clean Water Act and associated regulations. *Id.* ¶ 26; *See* 33 U.S.C. § 1314(b); 40 C.F.R. § 125.3(c)(2).

After undertaking this data gathering, analysis and assessment, EPA will prepare a draft general permit. Hanlon Decl. ¶¶ 25-29. EPA must publish any proposed general permit in the Federal Register and anticipates providing a 90-day public comment period because of the significant public interest in this issue. *Id.* ¶ 30. EPA must prepare a written response to all significant comments submitted, which EPA estimates will take substantial time given the public interest. *Id.* ¶ 31.

Further, EPA must coordinate with other federal agencies and States to ensure that any general permit complies with other federal and state requirements. EPA may be required to engage in consultation to comply with the Endangered Species Act. Hanlon Decl. ¶ 34. In accordance with Clean Water Act Section 401, 33 U.S.C. § 1341, EPA

must seek certification of the permit from all States, territories and tribes where discharges authorized under EPA's permit may occur. *Id.* ¶ 32. EPA must also assure consistency with the Coastal Zone Management Act. *Id.* ¶ 33. Each of these coordination activities will require significant time and resources to complete. *Id.* ¶¶ 32-24.

Finally, EPA will need to coordinate with and assist 46 States and the U.S. Virgin Islands, each of which will likely seek to issue its own general permits under their NPDES permit authority. *Id.* ¶¶ 7, 13. A general permit issued by EPA will provide permit coverage only in the four States in which EPA is the permitting authority, plus the United States' territories, tribal lands and federal facilities. *Id.* ¶ 7. Although the States will likely develop their general permits contemporaneously with EPA's development of its own permit, as a practical matter, States are unlikely to finalize their own permits until EPA issues a general permit that serves as a national model. The States must still complete their own notice and comment proceedings.

After the general permit is drafted, EPA and non-federal permitting authorities will have to ensure proper implementation of the general permit through outreach. Hanlon Decl. ¶ 36. The outreach will provide applicators, who have not previously been subject to NPDES permitting, time to bring their practices into conformance with the final permit and, if necessary, to submit written notice to seek coverage under the general permit.

In sum, EPA estimates that a stay of the mandate until April 9, 2011 will be sufficient to enable it and the non-federal permitting authorities to develop, propose and issue appropriate general per-

mits to authorize and regulate certain pesticide discharges to waters of the United States consistent with CWA requirements. Without such permitting authority, EPA and the other permitting agencies will experience disruptive consequences to their NPDES permit programs. In addition, significant disruptions to the regulated community, discussed in the next section, will likely occur.

2. Issuance of the Mandate at this Time Likely Will Disrupt Efforts to Protect Public Health, Agriculture and Other Historical Uses of Pesticides.

By issuing a mandate vacating the Rule either immediately or prematurely, the Court risks serious disruption of public health initiatives, agriculture and other activities. Numerous public entities apply pesticides to, over, or near waters of the United States to reduce risks posed by mosquitos. Agriculture and timber industries apply pesticides to, over, or near waters to combat devastating pests. Federal agencies use pesticides to support American agriculture and to facilitate navigation on the nation's waters. Virtually all of these pesticide users will have to make a difficult choice – apply pesticides in violation of the Clean Water Act or suspend pesticide uses – if the rule is vacated before NPDES permits are available to authorize appropriate uses.

Hundreds of local government agencies apply pesticides to, over, or near waters of the United States to control mosquito populations. Approximately 1,200 applicators nationwide, through an

estimated 19,000 applications annually, spray mosquito larvicides directly to water to kill mosquito larvae in the water. Hanlon Decl. ¶ 16. These same applicators, through an estimated 461,000 applications annually, aerially spray mosquito adulticides, often over waters of the United States. *Id.* Mosquitos spread infectious diseases, including West Nile virus and strains of encephalitis. *Id.* ¶ 17. Unchecked mosquito populations also adversely impact outdoor activities, tourism and the general public health and welfare. Because these mosquito abatement activities require in many instances the application of pesticides to, over, or near waters of the United States, absent a stay of mandate, they will not likely occur until permitting authorities issue permits.

Issuance of the mandate prior to the availability of permits will also disrupt the agriculture industry and the activities of the Department of Agriculture. Agricultural production requires the flexibility to respond quickly and appropriately to changing conditions, and the time required to obtain an individual NPDES permit will hamper a farmer's ability to respond to needed changes in crops or pesticides. Chin Decl., ¶¶ 2, 6-7. In addition, several Department of Agriculture agencies engage in applications of pesticides to, over, or near waters in fulfilling their responsibilities to respond to emerging threats and emergency situations posed by pests. *Id.* ¶¶ 9-11. The Forest Service and the Animal and Plant Health Inspection Service rely on pesticides to prevent outbreaks of pests, and these efforts could be disrupted if the mandate is not stayed pending issuance of permits. *Id.* The Agricultural Research Service engages in research programs that could also be disrupted or damaged by an in-

ability to apply pesticides until issuance of an NPDES permit. *Id.* ¶¶ 12-13.

Issuance of the mandate also may adversely impact navigation on the nation's waters. The Coast Guard uses pesticides to address wasps and other stinging insects that frequently nest in navigational devices and interfere with maintenance of the devices. Declaration of Erik S. Anderson, attached as Exhibit 3, ¶ 5. The Coast Guard applies pesticides to navigational aides to prevent poisonous plants from interfering with the functions of these navigational devices. *Id.* ¶ 6. These navigational aids are often in or adjacent to waters of the United States, and the pesticides used by the Coast Guard may, therefore, leave residual amounts in the water after use. *Id.* ¶ 4. As a result, issuance of the mandate will require the Coast Guard to suspend pesticide applications until a permit is available to authorize its applications, causing additional risks to navigation in the interim. *Id.* ¶ 7.

Thus, not staying the mandate will have potentially serious and disruptive consequences on significant sectors of the national economy. Even if EPA and the States exercise enforcement discretion and do not enforce the Clean Water Act against applicators of pesticide pollutants who apply consistent with FIFRA, pesticide applicators are subject to suits brought by citizens seeking to enforce the Clean Water Act. *See* 33 U.S.C. § 1365. For example, each of the pesticide application cases cited in this Court's opinion arose from a citizen suit. The threat of citizen suits has the potential to halt most pesticide applications to, over, or near waters of the United States until permit authorization is available.

C. The Potential Harm to Waters of the United States By Leaving the Rule in Place Does Not Require Issuance if the Mandate.

Postponing issuance of the mandate until appropriate permits are in place should not result in any unreasonable harm to waters of the United States. During this interim period, the final rule will exclude from permitting requirements only those pesticide applications undertaken consistent with FIFRA requirements. FIFRA requirements are established to avoid any unreasonable risk to humans or the environment. *See* 7 U.S.C. §§ 136a(c)(5) & (7), § 136(bb) . Leaving the rule in place for an additional 24 months will mean that pesticide application practices employed in recent decades will continue for an additional short period while EPA and the States work to develop and issue appropriate NPDES permits.

Leaving the rule in place will also avoid the disruption caused by an interim change in practice that will likely again be changed. *See Allied Signal*, 988 F.2d at 150-51. Environmental Petitioners in this case did not advocate a ban on all pesticide applications to, over, or near waters of the United States. Rather, they argued that such pesticide applications should be subject to Clean Water Act NPDES permitting requirements. *See* Environmental Petitioners' Opening Brief at 44-49, 57. EPA and the States will likely issue general permits to authorize some applications of pesticide pollutants to, over, or near waters of the United States subject to certain terms and conditions. This Court should not issue a mandate that will effectively ban application of all pesticides to, over, or near waters

of the United States for the interim period before the permitting agencies can issue permits that authorize certain pesticide pollutant discharges.

CONCLUSION

For the reasons set forth above, the Court should stay issuance of its mandate in this case until April 9, 2011.

CERTIFICATE OF SERVICE

[OMITTED]

EXHIBIT 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE NATIONAL COTTON COUNCIL OF AMERICA, *et al.* Appellant, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Appellee.	Nos. 06-4630; 07-3180/3181/3182/3183/3184/3185/3186/3187/3191/3236

DECLARATION OF JAMES A. HANLON

I, James A. Hanlon, declare that the following statements are true and correct to the best of my knowledge, information and belief, and are based on my personal knowledge and information supplied to me by employees of the United States

Environmental Protection Agency (EPA or Agency) under my supervision and information provided by my colleagues from EPA's Office of Pesticides Program (OPP).

INTRODUCTION

1. I am James A. Hanlon, Director of the Wastewater Management in EPA's Office of Water. I have served as the Office Director since April of 2002. As the Director of the Office of Wastewater Management (OWM), I direct the EPA office responsible for national program direction to the National Pollutant Discharge Elimination System (NPDES) permit program, including oversight of authorized State and Territorial NPDES programs. OWM has oversight responsibilities and provides technical assistance supporting EPA regional water programs. OWM also administers federal financial and technical assistance for publicly owned treatment works (e.g., municipal sewage collection systems and treatment plants). I supervise a staff of approximately 110 permanent full-time and part-time federal employees. OWM's annual program (operating) budget for fiscal year 2009 is approximately $28 million. OWM's operating budget also supports the management of State grants which total near $950 million.

2. Prior to my current position, I served as the Deputy Office Director of the Office of Science and Technology (OST) in EPA's Office of Water beginning in 1991. OST is responsible for the scientific and technical basis for federal water quality and safe drinking water programs, including establishment of national effluent limitations guidelines and analytical test methods. OST also provides scientific and technical support

to other Offices with program implementation responsibilities within the Office of Water, including OWM, the Office of Wetlands, Oceans, and Watersheds, and the Office of Ground Water and Drinking Water. I have worked for EPA for more than 36 years. I received a Bachelor of Science degree in Civil Engineering from the University of Illinois and a Masters of Business Administration degree from the University of Chicago. I am a registered Professional Engineer in the State of Illinois.

3. I have read the Sixth Circuit Court of Appeal's Opinion of January 7, 2009, in National Cotton Council of America, et al., v. EPA. I understand that the Environmental and Industry Plaintiffs challenged EPA's Final Rule: Application of Pesticides to Waters of the United States in Compliance with FIFRA ("Final Rule") as codified at 40 C.F.R. 122.3(h), which excludes from NPDES permitting those pesticide applications consistent with FIFRA requirements that are applied to or over, including near, waters of the United States. As a remedy in this litigation, I understand that the Court has determined that the Final Rule should be vacated.

4. Since January 7, 2009, EPA has been analyzing the Court's decision and its impacts while also providing support to the states and communicating to sectors of the regulated community and environmental groups. I have heard first-hand the concern and confusion amongst the permitting authorities and pesticide applicators about who will be required to obtain a NPDES permit. EPA has determined that the Court's decision clearly impacts the following point source discharges to, over or near waters of the United States: discharges of chemical pesticides that leave a residual or ex-

cess and discharges of all biological pesticides. My staff has also worked with the OPP to clarify what pesticide use patterns will trigger a requirement to obtain an NPDES permit. At least the following large categories are covered when sprayed to, over, or near waters of the United States:

- Mosquito larvicides
- Mosquito adulticides
- Herbicides used to control weeds in lakes and ponds
- Herbicides used to control weeds in irrigation systems and other waterways
- Herbicides used to control weeds along ditch banks in agricultural drainage systems
- Insecticides used in wide-area insect suppression programs
- Herbicides used in wide-area control programs directed at aquatic invasive plant species
- Herbicides, insecticides and other pesticides used in forestry programs when applied over waters of the United States.

5. Using available information sources, OPP estimated the number of pesticide applicators and applications for the identified use patterns identified

in paragraph 4. OPP estimates that these categories represent approximately 365,000 applicators and 5.6 million applications a year. OPP has also provided information to characterize the pest control needs which these pesticides address and the availability of other, non- pesticidal methods of controlling the target pests. Finally, OPP has provided information on the impacts of relying only on non-pesticidal methods of pest control. The information developed by OPP appears in Appendix A.

6. Because of the large number of similarly situated discharges, EPA intends to issue a general permit to cover pesticide discharges covered by the Decision. Individual permits are designed to address discrete discharges from fixed locations and would require an individual public notice and comment period. In fact, I do not believe either EPA or states would be able to provide timely coverage to pesticide applicators using individual permits for nearly all of the types of pesticide applications covered by the Decision. Thus, as a practical matter, I believe that EPA and NPDES authorized states will not be able to provide applicators with a way to comply with the CWA's NPDES requirements without drafting a general permit for covered application of pesticides.

7. A vacatur will require EPA and authorized states and territories to immediately develop NPDES permits that comply with NPDES regulatory requirements found in 40 CFR Part 122 and described in more detail below. This process will take 2 years to ensure that all necessary NPDES permit requirements are met. This estimate is partly based on EPA's recent experience in issuing the NPDES general permit for vessel

discharges, which took over 2 years to complete. Similarly, as discussed below, EPA is suggesting 24 months to develop a final NPDES pesticides general permit, including the time to work concurrently with authorized states and territories to draft and finalize their general permits simultaneously with EPA. When EPA issues an NPDES permit, it is only effective in non-authorized states (4), in territories, Indian Country, and on federal facilities. It is very important that the authorized permitting authorities keep in step with EPA to ensure national compliance with the CWA. A stay would provide EPA and NPDES authorized states and territories the time necessary to develop, propose, and implement an NPDES permit that would satisfy the CWA requirements.[1]

8. Vacatur of the rule before a NPDES permit can be issued by the permitting authority would place pesticide applicators in a vulnerable position where they would be subject immediately to potential citizen suits for violating the CWA if they discharge pesticide pollutants to, over or near waters of the United States. Moreover, the intentional discharge of pollutants without a permit could technically subject an applicator to criminal liability under the CWA, however, EPA would not expect criminal charges to be brought during the time period prior to NPDES permitting authorities being able to make a permit available for pesticide applicators. Significant harm to public health could result if applicators choose not to apply pesticides in order to reduce the risk of liability. Some states have informed us that applicators in their

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[1] EPA has authorized 46 States and 2 U.S. Virgin Islands to implement the NPDES program. Where, in this declaration I refer to authorized states, I am referring to the authorized states and the U.S. Virgin Islands.

states would not apply pesticides after the mandate in this case issues and prior to when a NPDES permit is available. A stay of the mandate until April 9, 2011 would prevent disruption to mosquito abatement programs, farming operations, forest management, irrigation districts, and other permittees.

9. For the reasons set out in this Declaration, I believe that the immediate vacatur of the Final Rule would cause significant disruption to both EPA's and authorized states' NPDES permitting programs, as well as the regulated community and others including federal agencies. First, I will provide a detailed description of the significant adverse effects arising from an immediate vacatur. Second, I will explain the time intensive NPDES permit development process that gives rise to EPA's request that the Court stay the mandate until April 9, 2011 (24 months).

ANTICIPATED IMPACTS TO EPA AND NPDES AUTHORIZED STATES AND TERRITORIES IF THE MANDATE ISSUES BEFORE NPDES GENERAL PERMIT IS ISSUED

10. The mandate, if it issues prior to the availability of an NPDES permit, will effectively prohibit the discharge of almost all pesticides to, over or near waters of the United States. This would result in substantial disruption for both EPA and the 47 authorized NPDES permitting authorities. If the Court's vacatur were to take effect before EPA and authorized states and territories are able to issue NPDES general permits, significant numbers of pesticide applicators would immediately be faced with discharging without a permit. There are significant legal risks (third—party citizen

suits) for any person determined to be discharging a pollutant into waters of the United States without a permit. Given these risks, I would predict that significant numbers of pesticide applicators would seek to obtain NPDES permits immediately upon issuance of the mandate, where the permitting authorities would not be prepared to respond.

11. NPDES authorized permitting authorities are concerned about whether they will have adequate resources to issue newly required permits that could potentially include hundreds of thousands of applications in each state. The current universe of point sources requiring NPDES permits to discharge includes individual and general permittees. Nationally, approximately 45,700 facilities are authorized to discharge under individual permits. Another 120,000 facilities (including 70,000 vessels) are authorized under general permits for non-storm water discharges. Until the recent inclusion of the 70,000 vessel dischargers, in general, the universe of non-storm water permittees remained more or less stable since the inception of the NPDES Program in 1972. The 1987 CWA amendments established NPDES permit requirements for storm water discharges and the number of permits for stormwater discharges has increased significantly since then. EPA's 1990 and 1999 actions to promulgate the NPDES regulations for storm water substantially expanded the universe of point sources subject to NPDES permit requirements. Today, approximately 7,000 municipalities (approximately 1000 in 1990 and another 6000 in 1999) require NPDES permits for discharges from municipal separate storm sewers; 270 of these need individual permits. Approximately 96,500 industrial storm water point sources need permits. Approximately 250,000 point sources of storm water associated

with construction activity require permits each year. Thus, the current total universe requiring NPDES permits (whether individual or general) is approximately 411,470 facilities. While most of the latter storm water discharges are authorized under general permits, more federal and state employees, resources, and expertise are now required to effectively manage the NPDES Program than ever before.

12. State governments have not matched the increased NPDES permitting work load with an increase in State environmental budgets. States have indicated that their environmental budgets have either been static or in decline for many years. In February 2003, the National Academy of Public Administrators confirmed an analysis by State environmental administrators demonstrating a budget shortfall of between seven hundred million to one billion dollars for implementation of State CWA programs. *Understanding What States Need to Protect Water Quality*, Report by a Panel of the National Academy of Public Administrators for the U.S. Environmental Protection Agency (2003). States generally have even fewer resources today. While the resources from the American Recovery and Reinvestment Act of 2009 will help fund needed infrastructure projects, additional funds under this Act are not available for NPDES activities. At the federal level, available resources for NPDES oversight activities have declined as well. In addition to increased numbers of point sources needing permits, other factors have increased pressure on NPDES permitting authorities including: (1) more complex legal challenges to entire programs and permits from the public, environmental groups, and industry; (2) increasing complexity of certain types of permits stemming from more sophisticated water quality-based regulatory requirements; (3) high employee attrition

rates in NPDES permitting staff, particularly state employees; and (4) declining federal grant funding, in real terms, that has historically augmented the operating budgets of state permitting agencies.

13. In past efforts to bring new categories of point source discharges into the NPDES permitting program, EPA has built in time to allow states to update their NPDES programs to address the new category prior to requiring permits for that category. EPA has spoken with the states and they anticipate needing at least 24 months in order to develop and implement a federally compliant program, with a longer time being needed if state statutes or regulations must be revised prior to permits being issued to pesticide applicators. [2] I acknowledge the need to issue and implement this general permit in an expedient manner. Under ideal conditions, EPA would build time onto the end of EPA's general permit process to enable states to model their general permits on EPA's. However, in order to expedite the process, here EPA plans on working concurrently with the states so they may simultaneously be working on their general permits.

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[2] EPA usually allows State programs one to two years to modify their programs, which includes EPA review and approval. This time is necessary for states to conform to changes in the Federal program. The timeframe typically depends on whether changes are required to State regulations or to statutes. See, e.g., 40 C.F.R. §123.62(e). Most states will not have to modify their regulations because they can issue NPDES permits for pesticide applications covered by the Decision under their current authorities.

ANTICIPATED IMPACTS TO PESTICIDE USERS IF THE MANDATE ISSUES BEFORE NPDES GENERAL PERMIT IS ISSUED

14. Pesticide users are concerned with what applications will be covered and how the upcoming spring spraying season will be affected. Pesticide users are extremely concerned that once the mandate is effective, they will become immediately subject to the requirement to have an NPDES permit and without one, will be subject to enforcement, and/or liable for citizen suits. If a pesticide applicator is required to have an NPDES permit, but cannot obtain one because the permitting authority is unable to issue a timely permit, an applicator would face a difficult choice. If the applicator chooses to apply the pesticide, he would risk being in violation of the CWA which would expose him to penalties of up to $32,500 a day. Alternatively, an applicator could decide not to apply a pesticide. The impact of not using a pesticide would depend on many factors, including the type and extent of the pest problem, the nature of the harm caused by the pest, and whether non-pesticidal alternatives were available to address the pest problem. The Court's vacatur will potentially affect many types of pesticide applicators who are not accustomed to obtaining NPDES permits while also requiring permitting authorities to develop and issue NPDES permits for a class of dischargers that they have little experience permitting.

15. The sheer number of applicators requesting NPDES permits will be significant. Although EPA is still considering aspects of the Court's decision that will ultimately affect the scope of the general permit, the Decision will clearly require large numbers of pesticide applications to be covered under an NPDES general permit.

At the very least, when the Court vacates the Final Rule, NPDES permits will be needed for each pesticide application that is applied directly to or over waters of the United States to control pests. Examples of such pests include mosquitoes, which transmit infectious diseases such as encephalitis and West Nile Virus, gypsy moths, which defoliate forests causing growth loss or the death of trees; algae and weeds, which can clog irrigation canals reducing the amount of water available to irrigate crops; and invasive species such as zebra mussels, which attach to and block water intakes for municipal water supplies and hydroelectric plants. Information from OPP shows that as many as 365,000 applicators perform more than 5.6 million of these types of applications annually, and would hence need NPDES permit coverage.

ACTIVITIES PROJECTED TO BE IMPACTED BY A NPDES GENERAL PERMIT

16. To illustrate the magnitude, I have included the following information developed by OPP on the impacts of premature vacatur of the EPA Final Rule on mosquito control programs in the United States. According to OPP, there are approximately 1200 Mosquito Abatement Districts (MADs) and other agencies in the United States that apply mosquito control pesticides, and we estimate conservatively that each MAD employs at least one applicator. In addition, OPP's analysis of available information, including information from the National Agricultural Aviation Association, Florida Coordinating Council for Mosquito Control and EPA data, indicates that there are 99 million acre treatments with adulticides per year and 4 million acre treatments with larvicides. (An acre treatment represents a single application of a pesticide to

an acre of land or water. Multiple applications to the same acre result in multiple acre treatments.) Based on information from these data sources on the distribution of aerial and ground applications made, and the number of acres treated per application by air and ground, there are approximately 461,000 applications with adulticides and 19,000 applications of larvicides per year. Together, the instances of adulticide applications, and the instances of larvicide applications yield the total estimate of 480,000 pesticide applications made annually by MADs and other agencies involved in mosquito control.

17. Programs to control mosquito populations are important for protecting public health. Although most types of mosquito-transmitted diseases have been eradicated from the United States, mosquitoes still carry some types of disease-causing organisms which they can transmit when they bite people or animals, notably including various forms of encephalitis, West Nile Virus, and dengue.[3] Disease carrying mosquito species are found throughout the U.S., especially in urban areas and coastal or in inland areas where flooding of low lands frequently occurs.

DEVELOPMENT OF A PROPOSED GENERAL PERMIT[3]

18. The development of a legally defensible general permit for covered pesticide discharges will be a complex process that requires in-depth analyses of technical issues, including the technology options used by pesticide applicators and the impact of their applications on water quality. NPDES permit requirements can be found at 40 CFR Parts 122. The requirements for approved NPDES state programs can be found in 40 CFR Part 123. Permit procedures can be found in 40 CFR Part 124. These regulations apply to EPA and to EPA NPDES programs administered by 47 state authorities.

19. The process to develop a general permit takes time (40 CFR Part 122, Subpart C). The development of a NPDES permit for pesticide pollutant discharges will require in-depth environmental and technical analyses. The permitting authority must identify the types of pesticides and applications that need permit coverage, and develop permit conditions necessary to meet the CWA requirements. The permitting authority must give public notice of a draft permit, provide for public comment, and respond to those public comments prior to issuing the permit. In parallel to these efforts, EPA the Agency plans to work with the state permitting authori-

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[3] A more in depth discussion of these types of diseases can be found at : Joint Statement on Mosquito Control in the United States from the U.S. Environmental Protection Agency (EPA) and the U.S. Centers for Disease Control and Prevention (CDC), at:

http://www.epa.gov/opp00001
/health/mosquitoes/mosquitojoint.htm

ties to assist them in developing their NPDES general permits. In addition, it is imperative for EPA and authorized states to inform and educate the regulated community regarding the permit requirements and the process to obtain permit coverage before the Court's mandate issues. As explained in this declaration, EPA estimates this administrative process to develop, propose, issue, and implement general permits will take until April 9, 2011, or 24 months to complete.

20. EPA must adhere to the following critical steps described below in order to develop permit conditions and requirements that comply with the NPDES regulatory requirements. Most of these steps are necessarily sequential under EPA regulations governing the permitting process. However, EPA is committed, where possible, to conduct tasks concurrently with other tasks to reduce the length of time it will take to complete the process. That process requires rigorous information gathering, collaboration with a variety of EPA experts, and careful technological and scientific analyses. The analyses will provide EPA with the critical information it needs to develop a technically sound general permit and meet the NPDES statutory and regulatory requirements found at 40 CFR Parts 122 and 125.

21. Identify information needs, collect and analyze data The first step in the development of an NPDES general permit is to collect the data necessary for a preliminary understanding of the scope of the universe of sources that might be permitted, existing practices used by and controls on those sources, and the possible technology-based and water quality-based requirements that might be included in one or more NPDES permits for those sources. EPA has begun to collect a wide variety of information and will continue to do so as it develops

permits for pesticide applicators. EPA will continue to engage in the following activities to collect and/or analyze the necessary information:

- Collection and review of information about pesticide labeling requirements and other aspects of the FIFRA program from EPA employees with expertise in pesticide regulations under FIFRA and by EPA employees with an expertise in the NPDES permit program under the CWA

- Review existing data on the effects of the relevant pesticides on water quality.

- Review existing state permits and other authorities that regulate pesticides and the extent to which they meet federal requirements.

- Collect and analyze data on the number of pesticide applicators and applications.

- Collect and analyze data on existing state water quality standards for pesticides, waters designated as impaired by these pesticides and any total maximum daily loads for pesticides.

- Review pesticide use patterns and analyze the extent to which differ-

ent permits or requirements would be appropriate.

- Analyze the extent to which existing pesticide labels require an integrated pest management approach to pesticide use, including consideration of the least toxic alternative.

- Review whether special permit requirements will be necessary to address inert ingredients and adjuvants.

- Review the types of application equipment and best management practices employed to minimize the impact of pesticides on water quality.

In my experience, the time it takes to develop and analyze such data can be lengthy and averages between 12 and 18 months, depending on the complexity of the universe to be permitted, in order to draft permit conditions and limitations (40 CFR Parts 123.43 and 123.44). In light of the urgency that would be created by the Court's vacatur, I estimate that a minimally adequate effort to identify information needs, and collect and analyze data could be performed in 3 months.

22. EPA's Office of Pesticide Programs (OPP) has an extensive database on the toxicity, environmental fate, and other properties of pesticides. In addition, under FIFRA, which OPP administers, any person who produces a pesticide must report annually on the identity and amount of pesticide product produced. This information, together with data from USDA and

private sources, give EPA a general understanding of the amounts of pesticide production and usage. Finally, OPP has additional information concerning equipment used to apply pesticides, methods of integrated pest management techniques, and other aspects of pesticide use that may be relevant to the development of a CWA general permit.

23. While OPP has collected a significant amount of data about pesticide usage and ingredients, it is critical for OWM to synthesize and analyze this data for CWA regulatory purposes because OPP data has been analyzed only under FIFRA.

24. Scope and define universe to be permitted. Because EPA will be developing a program for pesticide applicators who have never before had NPDES permits, it is EPA's experience that there will be "gray areas" that will require EPA to make decisions about whether some categories of pesticide applicators are or are not required to have an NPDES permit. EPA will need to clarify which applicators are eligible to be covered under the general permits developed by EPA. After analyzing the appropriate information and making preliminary decisions regarding the potential requirements likely to be required of certain categories of pesticide applicators, EPA will need to decide whether it will be necessary to develop different permits for specific subcategories of pesticide applicators. This process will most likely take place concurrently with the data analysis process described above.

25. Develop draft permit and fact sheet. Prior to issuance of an NPDES permit, EPA or an approved state must develop a draft permit and fact sheet that explains the basis for the requirements and conditions in the draft permit. *See* 40 CFR 124.8(a). EPA must

provide notice of these documents to the public and give the public an opportunity to comment on them. See 40 CFR Part 124.10. The development of these documents requires EPA to develop the permits' technology-based effluent limitations, any more stringent effluent limitations necessary to protect water quality, monitoring and reporting requirements and, standard and special conditions. These are discussed below. In my experience, in order to prepare a draft permit that will be developed sufficiently to allow for meaningful public comment and a legally defensible final permit, there must be several iterations of preliminary draft documents by the EPA workgroup, discussions with knowledgeable stakeholders and management review and decisions. I anticipate that this process will extend approximately 6 months beyond the initial data collection period.

26. Develop technology based effluent limitations. EPA will need to develop the technology-based permit limitations for the permit. The CWA requires that such permit limits reflect the "Best Available Technology Economically Achievable" (BAT). See 33 U.S.C.A §1311(b)(2)(A). Because there is no national effluent limitations guideline for pesticide applicators, EPA will need to develop technology based effluent limitations on a "best professional judgment" (BPJ) basis considering the same factors applicable to the development of an effluent guideline. 40 CFR 125.3(c) (2). This process will begin during our initial data analyses, depending on what data is received.

27. Develop water quality based effluent limitations, if and where necessary. An NPDES permit may not authorize a discharge that will cause or contribute to the violation of water quality standards. *See* 33 U.S.C.A. §1311(b)(1)(C). Because water quality stan-

dards are state specific, whether a discharge would violate water quality standards can vary from state to state. An NPDES permit must contain a water quality based permit limit if there is a reasonable potential for the discharge to cause or contribute to the exceedance of a water quality standard: *See* 40 CFR Part 122.44(d). For pesticide applications, such limitations might include limitations on the time of applications (e.g., fish spawning season) and limitations on where pesticides could be applied (e.g., not near drinking water intakes or in outstanding natural waters). EPA will need to review the water quality standards in each state for which it will be issuing a permit and determine whether additional limitations are needed to protect water quality. This exercise will take place concurrently with the critical steps described above.

28. Monitoring and reporting requirements. Permits must specify all monitoring and reporting that the permittee must perform. *See* 40 CFR 122.41(j). Such requirements vary depending on the nature of the effluent limitations in the permit. EPA will make efforts to ensure that any such requirements provide information that is useful and does not duplicate reporting that is being required under other state or federal laws. EPA is required by the Paperwork Reduction Act to develop an Information Collection Request (ICR) that estimates the burden of collecting and reporting information required by EPA. 44 U.S.C. 3501, et seq. The estimate must be based on estimates of the number of permittees and the average cost of the burden imposed on individual permittees. The ICR is made available for public comment along with the draft permit. EPA is required to consider the public comments, revise the ICR as appropriate, and then forward the ICR to Office of Information and Regulatory Affairs at the

Office of Management and Budget (OIRA), which again provides public notice. The draft ICR process will be prepared while preparing the proposed general permit.

29. Standard conditions and special conditions. All permits contain standard conditions that are required by 40 CFR Parts 122.41 and 122.42 and which delineate the legal, administrative and procedural requirements of the permits. Because they are "standard", EPA does not expect to need significant time to develop these for the general permit. Special conditions, on the other hand, may take considerable time to develop. Special conditions are non-numeric limits that require the permittee to undertake activities designed to reduce the overall quantity of pollutants being discharged, or to reduce the potential for discharges of pollutants. As is described in the U.S. EPA Permit Writers Manual at page 137, special conditions may be used for "facilities discharging pollutants for which data are absent or limited such that derivations of technology or water quality-based effluent limitations are difficult or impossible." Special conditions may contain preventative requirements such as best management practices. They also may impose additional monitoring requirements or special studies that provide the permit writer data to evaluate the need for changes in permit limitations. Because of the unique challenges of, and EPA's lack of experience with, developing NPDES permits for the pesticide applicators, EPA may need to expend considerable effort considering the need for and developing special conditions for the permit.

30. Public notice and public hearings. After EPA finishes drafting the proposed general permit, it is required to issue a public notice of the draft permit and to provide the public a minimum of 30 days to

comment on the permit. 40 CFR 124.10. If a hearing is scheduled, the comment period is automatically extended until the close of the hearing. 40 CFR 124.12(c). A hearing is required whenever there is significant public interest expressed during the comment period. I anticipate such interest and therefore EPA will most likely hold a hearing. Based on this anticipated interest, I believe there would be a benefit to providing a longer comment period such as the 90 days that EPA often provides for significant actions. This would also allow EPA an opportunity to schedule public hearings during the comment period and for commenters to then be able to include information presented at those hearings in their comments. This process will begin immediately after the draft general permit is completed and ready for publication. I anticipate that this process will take 3 months.

31. Respond to comments and develop Administrative record. At the close of the comment period on the proposed general permit, the work group must review the comments to determine whether appropriate changes to the draft permit should be made.[4] Even if comments do not result in such changes, EPA must prepare a written response to all significant comments. The

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[4] EPA intends to form a workgroup of co-regulators. The goal for this workgroup will be to provide EPA information on state pesticide permit programs, what works, what doesn't, and identify any state Agency barriers that could impede a state's timely issuance of Pesticides General Permits and/or processes that must be employed to remove these barriers. EPA will also confer with Association of American Pesticide Control Officials (AAPCO) and the State FIFRA Issues Research and Evaluation Group (SFIREG). AAPCO is an association that encourages uniformity among the states in their pesticide regulatory programs. Its members consist of state and federal pesticide regulatory officials.

time it takes to respond to comments is dependent on the number of comments and the complexity of the issues that are raised. For example, in response to the Federal Register Notice for the draft NPDES general permits for discharges incidental to non-recreational vessels, EPA received over 1600 comments and more than 10,000 pages of government reports and publications, scientific papers, and other information. The response to comment document which responded to all significant comments regarding the Vessels General Permit was 1,273 pages long and took four months of intense effort to complete. I anticipate a similar or greater level of public interest in a general permit for covered pesticide applications, ultimately, requiring as much, if not more of a significant effort to respond to comments as was required for the Vessels General Permit. During this period, the Agency will also revise the permit fact sheet and other analyses in light of comments received. I estimate that EPA will require 8 months to respond to comments and develop and publish a final permit. During this time, EPA will simultaneously perform related activities that various statutes require before the permit is final and which are described below.

32. CWA § 401 Certification. Under CWA § 401, EPA may not issue an NPDES permit unless it has obtained a certification (or a waiver of certification) from States, Territories, and certain Tribes where discharges authorized under the permit occur, regarding whether an authorized discharge will comply with their water quality standards or other appropriate requirements of their law. EPA must send letters to the certifying jurisdictions requesting written determinations regarding certification under CWA § 401. EPA will notify the certifying jurisdictions that EPA may not issue a permit authorizing discharges into their waters until the

certifying agency has granted certification under CWA § 401, or has waived its right to certify by not responding to the request for certification within 45 days from the date the draft permit was mailed to them. In addition, EPA will notify the certifying jurisdictions of the statutory and regulatory requirements applicable to CWA § 401 certifications, including the requirement that certifications must contain any specific conditions necessary to assure compliance with their water quality standards or other appropriate requirements of their law. 33 U.S.C. § 1341(d); 40 C.F.R. § 124.53(e) (1). States may publicly notice and solicit comment on their 401 certifications. This process will take a minimum of two months but will occur during the period when EPA is developing the response to comments on the draft permit and preparing the final permit.

33. Coastal Zone Management Act. Similarly, EPA may not issue a general permit authorizing discharges into waters of a State until after determining whether its action is consistent to the maximum extent practicable with the enforceable policies of approved State coastal zone management programs under the Coastal Zone Management Act ("CZMA"). 15 C.F.R. 930.31(d) and 930.36(e). EPA consults on its consistency determination with the affected State(s). A State may respond to EPA with conditions to the general permit that allow the State to concur with EPA's consistency determination. If EPA does not incorporate the State coastal zone management agency's conditions into the general permit or if the State coastal zone management agency objects to the general permit, then the general permit is not available for use by potential general permit users in that State unless the applicant who wants to use the general permit provides the State agency with the applicant's consistency determination and the State agen-

cy concurs. 15 C.F.R. 930.31(d). The National Oceanic and Atmospheric Administration (NOAA), the federal agency that administers the CZMA, has explained that "a State objection to a consistency determination for the issuance of a general permit would alter the form of CZMA compliance required, transforming the general permit into a series of case by case CZMA decisions and requiring an individual who wants to use the general permit to submit an individual consistency certification to the State agency in compliance with 15 CFR part 930." 71 FR 788, 793. In any State that has not provided conditions for incorporation into the permit, as well as any State that has not objected to the permit, EPA's CZMA compliance requirements derive from CZMA section 307(c)(1). Id. I expect that this process will occur simultaneously with the 401 certification process.

34. Endangered Species Act Consultation. Concurrent with the development of the proposed general permit, EPA will devote substantial resources to fulfilling its obligations under the Endangered Species Act (ESA), if EPA determines it is necessary. The ESA requires Federal agencies to ensure that the actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of their designated critical habitats. Pursuant to ESA § 7(a)(2) and its implementing regulations at 50 C.F.R. § 402.14(c), EPA will submit a request for consultation package to the National Marine Fisheries Service and the U.S. Fish and Wildlife Service ("Services") regarding the issuance of the Pesticides General Permit, if EPA determines that consultation is indicated because of the nature of activities that may take place under a permit. EPA intends to develop

a biological evaluation using the best available scientific and commercial data to analyze the potential effects of the proposed general permit upon listed species or critical habitat and a description of relevant listed species and their designated habitat. EPA will support the Services on their development of a biological opinion, if one is necessary. This will be a significant endeavor since the Pesticides General Permit will cover at least 500 active ingredients and as many as 900 inert ingredients. We estimate that it will take the entire length of the stay for the Endangered Species Act consultation, if it is determined to be necessary.

35. Issue final permit. The final general permit and supporting materials will reflect appropriate resolution of comments received and issues raised following the proposal. The final general permit will undergo an internal review process. A notice will be prepared that will be published in the Federal Register. This process will take place during the 8 month period identified above, which includes: response to comments, 401 certification, CZMA determination, preparation of the final Information Collection Request and OMB review of the Information Collection Request.

36. Implementation. EPA believes additional time is required after the final issuance of the general permit to make the regulated community aware of its terms and conditions. Given that most applicators will not have ever been subject to an NPDES permit, and depending on what the final permit requires, applicators will need time to bring their practices into conformance with the final permit. The general permit will specify whether or not some or all applicators must file a Notice of Intent prior to being covered by the general permit. Notices of Intent to be covered by a

general permit often must be accompanied by documents that describe the permittee's best management practices or other plans that the permittee will implement. The permittee would need time to develop and submit such documents. Although I can not predict the extent to which the final general permit will impose requirements that will take time for applicators to be able to comply with, I estimate that 4 months would be a minimally reasonable time to educate applicators and allow them to come into compliance with the terms of a new general permit. Four months will also provide time to non-federal authorized permitting authorities to issue and begin implementing their final general permits.

37. I am aware that twenty-three states have developed permits to cover some types of pesticide discharges. I am aware California issued its general permit on an emergency basis four months after the Headwaters decision to authorize certain short term and seasonal discharges of pesticide pollutants by public entities for resource or pest management. Additionally, the State of Washington issued its general permit 15 months after the Headwaters decision to authorize certain pesticide applications directed to aquatic plants. However, these permits cover only a specific subset of the universe of applicators and pesticides that will likely be covered by the general permit that EPA issues, such as pesticides for the control of weeds, algae, mosquitoes, non- indigenous fish, crustaceans and insects. Additionally, EPA must meet the rigorous statutory requirements outlined above. The estimated time that EPA is requesting the Court to consider reflects the additional time needed to develop, propose, and issue a general permit for all pesticide applications that are covered under the Opinion. My staff is evaluating the scope of these permits, their provisions, and require-

ments for maintaining and protecting water quality and compliance with the CWA. Thus, the time frames in which these two States issued their general permits do not represent the time needed by EPA and the States to issue permits in response to this Decision.

PAST EPA EXPERIENCE IN ISSUANCE OF VESSELS GENERAL PERMIT

As briefly discussed above, EPA recently issued the Vessels General Permit. That permit, which also addressed a category of discharges that had previously been exempt, is a useful illustration of the general permitting process and the time necessary to draft a general permit. I believe a similar amount of time is necessary to develop, propose, and issue an NPDES general permit for point source discharges of pesticides. The Vessels General Permit was a result of litigation over a long-standing EPA regulation that excluded discharges incidental to the normal operation of a vessel from the need to obtain a NPDES permit. The Vessels General Permit covers discharges incidental to the normal operation of vessels. The Vessels General Permit took over two years to propose and finalize. I have no reason to believe that this process would be any faster or simpler for pesticide discharges subject to the Court's decision.

SUMMARY OF TIME REQUESTED TO STAY THE MANDATE

EPA estimates that it needs until April 9, 2011 before the rule is vacated to develop, propose, and take final action to issue an NPDES general permit that would

be consistent with and satisfy the CWA requirements. In developing the NPDES General Permit for Pesticide Applications we will work closely with authorized states and will encourage them to develop their general permits concurrent with the development of EPA's draft general permit to expedite implementation.

CONCLUSION

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge and belief.

Executed on April 8, 2009

s/ James A. Hanlon

EXHIBIT 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE NATIONAL COTTON COUNCIL OF AMERICA, *et al.* Appellant, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Appellee.	Nos. 06-4630; 07-3180/3181/3182/3183/3184/3185/3186/3187/3191/3236

DECLARATION OF TEUNG F. CHIN, Ph.D.

I, Teung F. Chin, declare that the following statements are true and correct to the best of my knowledge, information and belief, and are based on my personal knowledge and information supplied to me by employees of the United States Department of Agriculture under my supervision.

1. I am the Acting Director, Agricultural Research Service, Office of Pest Management Policy, United States Department of Agriculture (USDA), Washington, D.C. I have held this position since January 2009. I have nineteen years' experience with pesticide regulatory policy in the food industry and in the federal government including the Environmental Protection Agency's (EPA's) Office of Pesticide Programs, USDA's Animal and Plant Health Inspection Service (APHIS), and currently in USDA's Office of Pest Management Policy. I have interacted extensively on pesticide regulatory issues with a broad spectrum of grower and farmer organizations, applicators, and mosquito control officials. I have also been involved with numerous pest action programs undertaken by APHIS and by USDA's Forest Service and research programs undertaken by the Agricultural Research Service.

2. I am writing to describe the harm that will be sustained by United States farmers and by USDA agencies if this Court's ruling in the above-captioned cases is put into effect without a stay to allow the EPA and states time to develop the appropriate NPDES general permits. The Court's decision will have profound implications for American farmers, potentially extending the application of the Clean Water Act to agricultural activities that EPA has never regulated before. The EPA's current NPDES individual permitting process may not meet the demands of agricultural production. Not only could the failure to obtain a timely NPDES permit for pesticide application disrupt planting for the current crop year, it could hamper American farmers' emergency pest management efforts and their ability to respond quickly to

new pest infestations or threats of infestations, thus increasing the risk of crop losses.

3. Additionally, several USDA agencies engage in the aerial application of pesticides, and could be affected by the Court's decision. The Forest Service and APHIS occasionally respond to emerging threats and emergency situations, and the inability to get a timely NPDES permit prior to the time EPA and the states issue general permits for pesticide discharges could compromise the agencies' ability to respond with efficiency and flexibility to these emerging threats and emergency situations. The Agricultural Research Service may have to curtail its research programs, setting back years of research. The time associated with obtaining an NPDES individual permit could substantially curtail the agencies' use of pesticides. As I will describe below, for the Forest Service, this could result in diminished efforts to protect the National Forests from pest infestation and could potentially increase the risk and severity of wildfire. For APHIS, delays associated with obtaining NPDES individual permits could result in established new pests or diseases which could have been eradicated with timely applications of pesticides.

I. Harm to United States Agricultural Producers

4. Pesticides include insecticides, herbicides, fungicides, piscicides, nematicides, miticides, fumigants, rodenticides, repellents, pheromones, insect growth regulators, plant growth regulators or anti-microbials. They are applied to prevent, destroy, repel, or mitigate the effects of target pests. They may be applied aerially, ground-applied, in-

jected, chemigated, fumigated, or hand-applied. Piscicides and aquatic herbicides are applied directly to water to control nuisance or exotic fishes and aquatic weeds.

5. According to a census by USDA's National Agricultural Statistics Service, there were 2,204,792 farms and ranches in the United States in 2007, covering 922 million acres. Harvested cropland totaled 310 million acres. The market value of agricultural products for these farms was over $305 billion dollars. Using data from the National Agricultural Statistics Service Census, CropLife America -- a trade association representing manufacturers of pesticides -estimated that in 2002, pesticides were applied on 947,000 farms. A 2005 study by the CropLife Foundation concluded that 215 million acres are treated with herbicides; and a March 2009 study concluded that 45 million acres of U.S. croplands were treated with insecticides.

6. Agricultural production requires flexibility to respond to changing and unpredictable conditions. The amounts and kinds of pesticides used by growers can vary from year to year as pest disease pressures change. Extreme weather, excessive rain, or drought, can force an agricultural producer to modify his crop plans and require adjustments to the type and amount of pesticides applied. In addition, changing market conditions and commodity prices also can cause a grower to switch crops within a year's time, which can dramatically change the mix and frequency of pesticides used.

7. The currently available NPDES permits are not likely to meet all of the demands of agriculture production. Using the aquatic noxious

weed control NPDES permit in the State of Washington as an example, the permit itself is specific to only the pesticides listed on the permit, and prohibits the use of those pesticides to combat any new aquatic weed pests without a modification to the permit. For general agriculture, pest problems can develop quickly and require a prompt response. Failure to apply a pesticide soon after a pest is first detected could result in recurring and greater pest damage in subsequent years if a prolific insect were to become established in a crop or other plant hosts. Fungal spores such as soybean rust can move hundreds of miles in a few days' time via the wind or faster in the event of a hurricane. The current NPDES individual permitting and permit modification process would hamper a farmer's ability to respond to routine crop or pesticide changes, as well as to respond quickly to emerging threats or to emergency situations. Delays in receiving an NPDES individual permit could lead to crop losses. These crop losses may not be compensated if crop insurance requires the prompt use of pesticides to mitigate risk.

8. If agricultural producers are required to apply for NPDES individual permits for pesticide use in the spring of 2009, before EPA or states issue general permits, there is likely to be widespread confusion regarding the scope of the permitting obligations. EPA and state guidance is necessary to address a multitude of specific issues ranging from the appropriate applicant (the landowner, the land-renter, or the hired pesticide applicator) to the affected bodies of water on or near the farm or forest land. Numerous farmers have already made planting decisions and purchased pesticides in reliance on the final EPA rule that

provided that pesticide applications to or over, including near, waters of the United States in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act did not require NPDES permits. Farmers will be fearful of citizen lawsuits permitted under the Clean Water Act.

II. Harm to USDA Programs.

9. Programs administered by USDA -- including land management activities with respect to invasive plant species, fuels reduction, and wildlife populations and habitat -- also will be subject to disruption and delay by the immediate requirement to obtain NPDES permits.

10. Just as agricultural producers must respond quickly to weather events, emerging threats, and emergency situations, USDA also must respond to events and pest outbreaks that are unpredictable in their location and severity and may encompass several states simultaneously. Insect outbreaks in particular can erupt or change direction rapidly, requiring flexible and timely responses from land managers to limit the resulting property damage, environmental damage, and economic losses. Many USDA projects are time-sensitive.

A. Forest Service Programs:

Gypsy Moth and other defoliating insects: The program to suppress, eradicate, or slow the spread of the European gypsy moth in eastern states is the largest aerial spray forest operation in the United States and often occurs over or near waters of the United States. The Asian gypsy moth has been eradicated, but trapping programs are in place to detect new introductions from overseas. These pests pose major threats to hardwood forest resources and eco-

systems wherever conditions favor population increases, or when they are introduced into new locations. Delays of field operations caused by immediate implementation of the NPDES permit requirement could render these programs largely ineffective.

Invasive Plant Control: Invasive plants corrupt a region's ecological processes, displacing native plants, reducing wildlife habitat, disrupting nutrient cycling, consuming more water than native plants and changing water tables. In addition, their proliferation provides powerful fuel for wildfires, increasing the likelihood of and severity of future wildfires. This year the Forest Service plans to treat at least approximately 30,000 acres of invasive plants in Oregon and Washington, alone. If a major delay occurs in the ability to apply herbicides as planned, and on schedule, this year or in following years, these invasive species will continue to spread and increase in size. This could result in greater cost to taxpayers, and permanent loss of some habitats that cannot be effectively controlled after a delay. The Forest Service employs the aerial application of herbicides to control leafy spurge and knap weeds in the West and cheat grass in the South. These aerial applications have the potential to occur over or near waters of the United States.

Impacts to wildlife (Threatened and Endangered Species, and Game Species): The Forest Service conducts many projects to improve habitat for wildlife using vegetation treatments that include the use of herbicides applied to, over, or near waters of the United States. For example, the Forest Service cooperates with the Fish and Wildlife Service and several Florida state agencies to

carefully manage herbicide applications directly into water to control invasive plant species in waterways to improve habitat for the endangered Florida Manatee.

These treatments often are time-critical, and are usually coordinated to have specific effects. If delays in obtaining appropriate NPDES permits cause the Forest Service to miss a window of opportunity to apply the herbicide, some projects could be delayed, could be less efficacious, could require either additional chemicals or mechanical treatments to compensate for the delay, with a result of increased cost, or may be cancelled altogether. The window of opportunity for an application of herbicide may sometimes be a matter of only a few weeks.

Aquatic plant control: Aquatic herbicides are used to an increasing extent for control of aquatic invasive plants in water bodies on National Forests. Invasive aquatic plants reduce the habitat required by native animals and birds. The Forest Service makes direct applications of herbicides into water to control giant salvinia in Texas and hydrilla in the Northeast.

Other applications/general: The Forest Service and its partners use aerial applications of herbicides to maintain powerline right-of-ways, to remove woody vegetation which allows water to infiltrate hydropower facilities (dams), and to improve range conditions, among other things. These aerial applications are made over or near waters of the United States. Delays resulting from the permitting process could have broad economic impacts, such as reduction of range forage available

to grazing permittees, or damage to hydropower facilities.

B. APHIS Programs

11. One of APHIS's mandates is to prevent the establishment of foreign plant or animal pests and diseases. See http://www.aphis.usda.gov/about_aphis/. In many cases, an immediate response using pesticides is required to eradicate these quarantine threats. It is also critical that APHIS respond immediately to biosecurity emergencies that involve aerial application of pesticides. Following are some examples:

Crop Biosecurity: APHIS Plant Protection & Quarantine must be able to conduct coordinated responses to large biosecurity emergencies as reflected in the Homeland Security Presidential Directive 5, issued February 28, 2003. This directive requires that all federal departments and agencies adopt the National Incident Management System in their domestic emergency management. In the interest of Homeland Security, APHIS, and other federal agencies, working with state partners and growers must maintain the ability to respond immediately by application of pesticides, including aerial application if necessary, to deliberate or inadvertent introductions of new pests or diseases which may threaten the biosecurity of the United States. For example, a sudden large-scale introduction of Foot and Mouth disease, wheat rust or soybean red leaf blotch could threaten the U.S. food supply. As a last resort, aerial spraying might be used, and might be over or near waters of the United States.

Exotic Fruit Fly Programs: APHIS quarantine pest eradication programs include Mediterranean, Mexican, and Oriental fruit flies, which can inflict 400 host plants including peaches, plums, apples, apricots, avocados, citrus, cherries, figs, guavas, nectarines, peppers, tomatoes and several nuts, resulting in severe economic damage. A 2002 estimate of the United States market value of the commodities that could host exotic fruit flies was $7.2 billion. These fruit flies can be introduced from imported cargo shipments. If not detected in time, a small infestation can develop into a widespread outbreak making essential a rapid response with pesticides within a matter of days before the population further multiplies, spreads and becomes permanently established in the continental United States. Florida has encountered multiple large-scale outbreaks of Mediterranean fruit flies. Aerial spraying might be used, and might be over or near waters of the United States.

Mormon Cricket and Grasshopper Outbreaks: About 40 species of grasshoppers can cause significant damage to crops and forage. Grasshopper and Mormon cricket outbreaks in 2001 caused an estimated $25 million in damage to crops in Utah alone, but outbreaks have historically occurred throughout 17 western states. In 2009, 96 million acres in the Western States have elevated populations of grasshoppers. There is an annual need to apply pesticides aerially to reduce pest damage for Western farmers and ranchers, and some of this aerial spraying likely will occur over or near waters of the United States.

Zoonotic Outbreaks - The ruling will significantly affect APHIS' s ability to respond to a

mosquito borne zoonotic disease outbreak such as Rift Valley fever virus, which is a threat to livestock as well as to humans. Larvicide treatments directly into water would be curtailed enabling the larvae to emerge as adult mosquitoes which are vectors of the virus and spread the disease. Aerial applications over wide areas also would be affected if there were a need to identify and avoid all bodies of water. APHIS would likely be limited to treating only isolated strips of land, not only making it difficult for aircraft to fly those patterns, but also likely rendering the eradication effort ineffective.

C. Agricultural Research Service

12. USDA's Agricultural Research Service conducts research programs throughout the fifty states and in U.S. territories, some of which are located close to waters of the United States. The research programs can include application of pesticides and/or biological control agents as either a component of conventional agricultural production systems or as an experimental treatment in a scientific trial. If these programs were subject to an immediate NPDES permit requirement, the Agricultural Research Service would have to suspend these applications near water until proper permits could be obtained. This could seriously jeopardize on-going research trials, some of which are multi-year trials. An interruption in the experimental plan could compromise the integrity of the experiment, requiring the experiment to be repeated after the newly required permits are in place. This could result in a loss of the resources already invested in the trial and a delay in critical new in-

formation and technologies to solve high priority agricultural problems.

13. The Agricultural Research Service research programs involving direct applications of pesticides into water and aerial applications over water for the control of mosquitoes and biting flies would be halted to the detriment of public health and livestock efforts. Direct applications of pesticides to water for Agricultural Research Service's aquaculture research efforts would similarly be halted.

II. Conclusion

14. The immediate application of the NPDES permitting requirements, pursuant to this Court's decision, will disrupt American farmers' and USDA agencies' ability to conduct not only routine business, but also will compromise their ability to respond efficiently and effectively to emerging threats and emergency situations. Time is necessary for both agricultural producers and USDA agencies to determine the type of permits their activities will require, and to allow EPA and the states to issue appropriate NPDES permits.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge and belief.

Dated this 7th day of April, 2009.

s/ Teung F. Chin, PhD
Acting Director
Agricultural Research Service
Office of Pest Management
Policy

EXHIBIT 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE NATIONAL COTTON COUNCIL OF AMERICA, *et al.* Appellant, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Appellee.	Nos. 06-4630; 07-3180/3181/3182/3183/3184/3185/3186/3187/3191/3236

DECLARATION OF ERIK S. ANDERSON

I, Erik S. Anderson, declare that the following statements are true and correct to the best of my knowledge, information and belief, and are based on my personal knowledge and information and belief,

and are based on my personal knowledge and information supplied to me by employees of the United States Coast Guard operating under the Coast Guard's Aids to Navigation Program.

1. I am the U.S. Coast Guard Visual Navigation Program Manager responsible for providing policy oversight for the Coast Guard's Short Range Aids to Navigation Program. In this capacity, I administer and supervise the operation and routine maintenance of the United States aids to navigation system, which is comprised of approximately 50,000 federal aids located throughout the United States and territories, including approximately 10,000 river-miles within the Mississippi River and Columbia River systems.

2. I have served on active duty in the U.S. Coast Guard for approximately 20 years. I have been involved directly in the aids to navigation mission for approximately 13 of these years, including performing duties as a Commanding Officer of a Coast Guard sea-going buoy tender directly responsible for servicing aids to navigation. I have served as the visual navigation program manager for approximately 2 years. I am a graduate of the United States Coast Guard Academy and hold master degrees in business administration and operations research. I also hold a license as a master mariner of vessels of any gross tons operating upon ocean and near coastal routes.

3. One of the United States Coast Guard's primary missions involves contributing to marine safety by providing reliable aids to navigation to assist mariners. In order to further navigational safety and meet minimum thresholds of due care, the Coast Guard must ensure the availability and re-

liability of established maritime aids to navigation. Short range aids to navigation include buoys, beacons, and light structures. Beacons and light structures may be located either on land or in the water.

4. The Coast Guard uses EPA-approved pesticides in two circumstances associated with its maintenance of aids to navigation. In both these circumstances, the Coast Guard anticipates that pesticides applied in and around aids to navigation may result in excess or residual pesticides being discharged to waters of the United States.

5. Coast Guard personnel must provide periodic maintenance service to ensure the reliability of aids to navigation signals (e.g. light and/or daymark) and respond when aids to navigation outages occur. Because stinging insects (e.g., wasps) frequently nest on or near the structures that Coast Guard personnel must access for servicing, the use of insecticides for protection is required.

6. In addition, aids to navigation occasionally become obscured by overgrown vegetation on, and in the area surrounding, aids to navigation structures. To ensure these aids remain visible to mariners, the Coast Guard routinely utilizes manual brushing methods to remove obscuring vegetation. The density of poisonous plants (e.g., poison ivy) in the vicinity of an aid to navigation has, however, required the use of pesticides in the past because Coast Guard members have had severe and debilitating reactions to poisonous plants when clearing brush manually. When using pesticides in such situations, the Coast Guard uses commercially available pesticides approved by the United States Environmental Protection Agency (EPA). In order to provide for the safety of Coast Guard servicing person-

nel, it is important that the use of pesticides remain an option to be used as necessary.

7. The Coast Guard previously relied on the interpretations of the United States Environmental Protection Agency and State permitting authorities, which determined that the use of pesticides in accordance with FIFRA are generally not subject to Clean Water permit requirements. As a result, the Coast Guard does not possess Clean Water Act permits that authorize the discharge of pesticides to waters of the United States in connection with maintenance of Aids-to-Navigation. Without Clean Water Act permits, the Coast Guard may not be able to maintain all of its aids to navigation. The Coast Guard's inability to apply pesticides could lead to a reduction in the availability and reliability of the inland aid to navigation system, thereby increasing transit risks and reducing waterway capacity.

I declare under penalty of perjury that the foregoing is true and correct, based on my personal knowledge and on information provided to me by employees of the United States Coast Guard under my policy oversight.

Dated this 10th day of April, 2009

s/ Erik S. Anderson
Erik S. Anderson Commander
U.S. Coast Guard

APPENDIX E

No. 06-4630 (and consolidated cases)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL COTTON COUNCIL OF AMERICA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition For Review of Final Action of the United States Environmental Protection Agency

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RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S REPLY BRIEF IN SUPPORT OF MOTION FOR STAY OF MANDATE

JOHN C. CRUDEN
Acting Assistant Attorney General

ALAN D. GREENBERG
Attorney, U.S. Department of Justice
Environment & Natural Resources Division
1961 Stout Street – 8th Floor
Denver, CO 90294
(303) 844-1366

Of Counsel:
MINDY NIGOFF
U.S. Environmental Protection Agency
Washington, D.C. 20460

May 27, 2009

TABLE OF CONTENTS

[OMITTED]

TABLE OF AUTHORITIES

[OMITTED]

INTRODUCTION

EPA moved for a stay of the mandate in this case until April 9, 2011 to avoid substantial disruption under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES"). As EPA explained in its motion, EPA seeks to avoid significant disruption to NPDES permitting authorities, which do not have the resources to timely process and issue thousands of permits for application of pesticides to or over, including near, waters of the United States.[1] EPA also seeks to avoid substantial disruption to the estimated hundreds of thousands of pesticide applicators who apply pesticides to waters to target mosquitos and other pests and, in most cases, will not do so if the mandate issues before NPDES permits are available.

Contrary to Environmental Petitioners' assertions, this Court's mandate will cause a major change to how pesticide applications to waters have been regulated under the Clean Water Act ("CWA") for over 30 years. Thus, the rationale for the two-year stay in *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008), justifies a stay here.

Environmental Petitioners fail to acknowledge that neither EPA nor the NPDES-authorized States have the resources to handle a potential eight-fold increase in individual NPDES permit applications

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[1] In this reply, EPA uses the phrase "to waters" as a shorthand for "to or over, including near, waters of the United States."

caused by the absence of a NPDES general permit for the large majority of pesticide applications.

Environmental Petitioners also unjustifiably discount the consequences to pesticide applicators if the Court does not stay the mandate. Pesticide applicators have already received at least 45 notices of intent to sue for pesticide discharges. While EPA and the NPDES-authorized States may exercise enforcement discretion, nothing prevents the filing of citizen suits against pesticide applicators for discharging pesticides to waters without a permit. Mosquito control agencies likely will forgo spraying to waters rather than risk the assessment of penalties of up to $32,500 per day plus liability for a citizen plaintiff's attorneys fees.

ARGUMENT

A. A Stay of Mandate is Appropriate When a Court Decision Results in a Major, New CWA Permit Obligation and the Unavailability of Permits Will Result in Significant Disruption.

In EPA's Motion for Stay, EPA summarized the well-reasoned analysis of the courts in *Northwest Environmental Advocates*, which supports the two year stay that EPA seeks in this Court. EPA's Motion at 6-8; *Northwest Envtl. Advocates*, 537 F.3d at 1025-26. Environmental Petitioners' efforts to dis-

tinguish *Northwest Environmental Advocates* focus on immaterial differences.[2]

Dischargers of pesticides to waters, like the dischargers of ballast water affected by *Northwest Environmental Advocates*, did not need NPDES permits prior to recent court decisions. EPA's practice since the 1970s exempted pesticide applications from NPDES permit requirements just as it did ballast water discharges. In the Final Rule, EPA stated that "[i]n the more than 30 years that EPA has administered the CWA, the Agency has never issued an NPDES permit for the application of a pesticide to or over water to target a pest that is present in or over the water." 71 Fed. Reg. 68,483, 68,484 (Nov. 27, 2006). Further, EPA never "stated in any general policy or guidance that an NPDES permit is required for such applications." *Id.* The immediate vacatur of EPA's long-standing regulatory approach of not issuing NPDES permits for pesticide applications creates a "practical impossibility" of immediately obtaining NPDES permits for discharges previously unregulated under the CWA. *See Northwest Envtl. Advocates*, 537 F.3d at 1026. Thus, Environmental Petitioners misconstrue the history of CWA regulation of pesticides as it existed since 1972 in their attempt to distinguish *Northwest Environmental Advocates*. Quite simply, prior to 2000, the application of pesticides to waters was treated the same as the discharge of ballast water – no NPDES permit required.

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[2] Contrary to Environmental Petitioners' argument, Envtl. Opposition at 3-5, a stay of mandate may be issued in situations where the agency exceeded its statutory authority. *See, e.g., E.E.O.C. v. CBS, Inc.*, 743 F.2d 969, 975-76 (2d Cir. 1984).

Environmental Petitioners' attempt to rewrite recent history also fails. They again materially misquote a Federal Register statement to support their argument that EPA required NPDES permits for discharges of pesticides to waters. Envtl. Opposition at 6. The accurate quote from EPA's Water Quality Planning and Management Regulation stated: "EPA declines *at this time* to define 'chemical wastes' as that term appears in the definition of 'pollutant' to exclude pesticides designated for aquatic uses." 65 Fed. Reg. 43,586, 43,593 (July 13, 2000) (emphasis added). EPA's decision not to offer a formal interpretation in 2000 (or at any time prior to 2006) is not inconsistent with EPA's long-standing practice.

The Environmental Petitioners' reliance on EPA's amicus brief in *Headwaters v. Talent Irrigation District* does not establish an EPA policy of requiring permits for pesticide applications to waters. EPA's amicus brief in *Headwaters* argued that "where the use of the pesticide *constitutes the discharge of a pollutant* from a point source into the navigable waters, the pesticide user must also obtain an NPDES permit." *Headwaters* Brief at 15-16 (emphasis added), JA 52-53. EPA did not address under what circumstances "the use of the pesticide constitutes the discharge of a pollutant" and requires an NPDES permit.

Four years later, EPA confirmed its long-standing position that pesticide applicators did not need NPDES permits to discharge pesticides to target pests in or over waters. *See Gem County Mosquito Abatement Dist. v. EPA*, 398 F. Supp. 2d 1, 5 (D.D.C. 2005).

In sum, the *status quo ante* did not require NPDES permits for pesticide applications, except during several years following *Headwater* for certain applications in the Ninth Circuit. This Court's decision now imposes an NPDES requirement nationwide that creates the same regulatory dilemma and justifies the same stay as employed in *Northwest Environmental Advocates*.

B. A Deluge of Individual Permit Applications Will Disrupt Regulatory Agencies.

Contrary to Environmental Petitioners' argument, Envtl. Opposition at 9, EPA identified a significant disruption to permitting authorities that can be avoided by a stay of the mandate. EPA acknowledges that developing permits is the job of EPA and State permitting authorities. The question, however, is whether EPA and the States must respond immediately to anticipated applications to issue hundreds of thousands of individual permits as opposed to having the time to issue general permits that could efficiently and effectively provide permit coverage.

As a result of the Court's decision, EPA estimates that hundreds of thousands of pesticide applicators must now obtain NPDES permits to discharge pesticides to waters. If the mandate issues now, the only option for the large majority of pesticide applicators is submission of an individual NPDES permit application. Individual permitting programs that nationally handle 45,700 facilities for the entire NPDES program would be disrupted by receiving as many as an additional 365,000 individual permit applications from pesticide applicators. *See* Declara-

tion of James A. Hanlon, attached to EPA's Motion as Exhibit 1, ("Hanlon Decl.") ¶ 11.[3]

Instead of this infeasible individual permit approach, permitting authorities should use general permits to address the significant permitting demand. A general permit will take 24 months to develop and issue. Hanlon Decl., ¶¶ 4, 7, 18-36. The general permits previously issued by states will not obviate the need for the stay of mandate requested by EPA. Environmental Petitioners note that California issued a general permit in four months, Envtl. Opposition at 9-10. Unlike California, EPA must comply with several statutory requirements that dictate time consuming procedures prior to issuing a permit. *See* Hanlon Decl. ¶¶ 20-36. Moreover, California issued its permit "under emergency conditions" and, because of those emergency conditions, acknowledged that many of the actions that would normally occur prior to issuance of such a permit had not yet occurred. General Permit No. CAG990003, 2001 Cal. ENV LEXIS 12, at *31-*32 (July 19, 2001). An affiliate of one of the Environmental Petitioners filed a lawsuit challenging several aspects of this California permit.[4] In addition,

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[3] In paragraph 5 of Mr. Hanlon's declaration, he refers to an Appendix to his declaration. In fact, there is no appendix and the reference was in error.

[4] *See* General Permit No. CAG990004 at ¶ 4, submitted as Attachment 1 to the Declaration of David Brown, which is Attachment A to Respondent- Intervenors' Response in Support of Respondent United States Environmental Protection Agency's Motion for Stay of Mandate. Over two years later, California developed its current general permit, and it only covers larvicide applications; no general permit exists for adulticide applications. Declaration of David Brown, ¶¶ 11, 14.

the permits previously issued by 23 states either address limited pesticides or limited applications, not the universe of applications and pesticides likely to be covered by the general permit EPA issues. Hanlon Decl. ¶ 37. EPA's use of these permits as models does not eliminate the requirement that EPA comply with the federal process for the issuance of permits. *See* Hanlon Decl. ¶¶ 18-36.

Contrary to Environmental Petitioner's suggestion, Envtl. Opposition at 10, guidance does not provide an effective solution. The substantial time needed to develop guidance would not be much shorter than development of a permit and would delay EPA's efforts in issuing the necessary general permit. Because guidance has no legal effect, it would not protect applicators from citizen suits.

C. The Unavailability of Permits Will Disrupt Industry.

Environmental Petitioners refuse to acknowledge disruption to pesticide applicators based on their incorrect contention that this Court's decision returns us to a time when NPDES permits were required for pesticide applications to waters. As EPA argued above, this was not and has never been the state of affairs across the nation. The enforcement activity by citizen groups since the Court's decision highlights this change.

As Environmental Petitioners admit, prior to this Court's decision only a handful of enforcement actions had been brought against pesticide applicators, none by EPA or the States, and all within the last ten years. *See* Envtl. Opposition at 12 and note 11 (citing six cases). In contrast, since the Court's decision, at least 45 mosquito control agencies have

received notices of intent to sue for violations of the CWA.[5] Environmental Petitioners discount impacts to agriculture, Envtl. Opposition at 14, but the U.S. Department of Agriculture received a notice of intent to sue arising from its pest control activities. *See* letter dated April 20, 2009 from WildEarth Guardians, attached to this Reply as Exhibit 4. Because no NPDES permits are available to cover these discharges of pesticides, these pesticide applicators face the choice of ceasing application of pesticides or violating the law.

Immediate issuance of the mandate will result in increased threats to public health because most efforts to control mosquitos, which transmit several debilitating diseases, will cease or risk CWA enforcement because NPDES permits are not currently available. Environmental Petitioners tout the results achieved in the suit against the Gem County Mosquito Abatement District in Idaho, Envtl. Opposition at 13, but their description does not provide a full story. The settlement in that case places no limits Gem County's on larvicide applications to waters, which are the more effective mosquito abatement approach. These larvicide applications to waters will now violate the CWA unless covered by a permit, and none exist to cover pesticide applications in Idaho. EPA questions whether the mosquito populations and West Nile virus figures for Gem County will re-

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[5] Declaration of Karl Malamud-Roam, ¶ 7, Attachment C to Respondent-Intervenors' Response in Support of Respondent United States Environmental Protection Agency's Motion for Stay of Mandate. As of May 21, 2009, EPA has received copies of 40 notices of intent served upon mosquito control agencies

main below average once Gem County suspends its larvicide applications upon issuance of the mandate.

D. Pesticide Applicators Are at Risk of Significant Penalties and Other Financial Costs for Violating the Act.

Rather incredibly, Environmental Petitioners assert that EPA exaggerates the financial risks to pesticide applicators. Envtl. Opposition at 15-16. The risk does not arise from federal or state government enforcement actions. The risk arises from citizen suits, which have been the source of all the litigation to date and the source of at least 45 threatened new lawsuits. Few applicators will want to rely on judicial discretion in assessing penalties. Further, Environmental Petitioners ignore the ability of successful citizen plaintiffs to recover their ligation costs, including attorneys fees. 33 U.S.C. § 1365(d). The costs to a pesticide applicator of paying the plaintiff's as well as its own litigation costs is a financial "penalty" that provides powerful incentives for applicators to avoid pesticide applications to waters without a NPDES permit.

CONCLUSION

For the reasons set forth above and in EPA's motion, the Court should stay issuance of its mandate in this case until April 9, 2011.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE NATIONAL COTTON COUNCIL OF AMERICA, *et al.*	)	
Petitioners,	)	
v.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	)	Case No. 06-4630 (and consolidated cases)
Respondents,	)	
and	)	
AMERICAN FARM BUREAU FEDERATION, *et al.*,	)	
Respondent-Intervenors.	)	

DECLARATION OF DON PARRISH

I, Don Parrish, hereby declare as follows:

1. I am the Senior Director of Regulatory Affairs at the American Farm Bureau Federation (Farm Bureau). I have worked with farmers through

Farm Bureau for over 20 years on issues related to water quality and pesticides.

2. Farm Bureau is a voluntary general farm organization dedicated to the betterment of agriculture and agricultural communities. Farm Bureau is comprised of 50 State Farm Bureaus and Puerto Rico Farm Bureau, which function jointly as a federation through a membership agreement.

3. A large number of Farm Bureau farmer members depend for their livelihood on the production of crops whose efficient and economic production requires the use of pesticides. Farm Bureau members produce every type of crop produced in the United States. Because Farm Bureau's members produce crops on land and sometimes in water, they use both terrestrial and aquatic pesticides applied through both ground and aerial applications.

4. Many – if not most – farmers produce crops on lands that contain some "wetland" areas or that adjoin a wetland, stream, or roadside ditch that could be viewed as "waters of the United States" because they arguably have a hydrologic connection to "navigable waters." *See Rapanos v. U.S.*, 547 U.S. 715, 778-83 (2006). For this reason, even aside from crops produced in water, a tremendous number of farmers are affected by the Court's decision vacating EPA's rule that excluded from National Pollutant Discharge Elimination System (NPDES) permitting requirements pesticide application, in accordance with all relevant label requirements, to control pests "over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United

States in order to target the pests effectively." *See* 71 Fed. Reg. 68,483, 68,492 (Nov. 27, 2006).

5. The responsible use of pesticides is a key component of many successful agricultural operations. According to the USDA's National Agricultural Statistical Service ("NASS") survey, about 947,279 farms reported the use of pesticides in 2007. The NASS survey also tells us that there are about 347,760 corn farmers in the nation, and 95.8 percent of the 93,527,000 acres of corn are treated with at least three pesticides to produce our nation's corn crop. Similarly, there are 18,286 cotton producers in the U.S. and about 98.2 percent of the 10,827,000 acres of cotton are treated with at least 13 pesticide treatments. While I have only provided two examples, this illustrates the vast number of pesticide applications in the U.S. each year that are potentially affected by the court's ruling.

6. It is my understanding that EPA has never required NPDES permits for pesticide applications and has never issued such a permit. I am aware of several Clean Water Act lawsuits and threats of lawsuits by citizens groups since the late 1990s, in which citizens claimed that pesticide application is subject to NPDES permitting requirements. I am also aware of farmers who, faced with a citizen's "notice of intent to sue" under the Clean Water Act alleging that pesticide application was a "discharge" of a "pollutant" to waters of the U.S., have been unable to obtain NPDES permits either under their state's delegated NPDES permitting agency or directly from EPA. Because there was no EPA regulation explicitly stating that these activities do not require NPDES permits, farmers have been vulner-

able for the past decade to citizen suits or threats from activists seeking to stop the use of pesticides.

7. Farmers using pesticides understand that they must follow pesticide labels because "the label is the law" and they face significant liability for not following the label. Even if farmers follow the label, it is expected that some residual amount of pesticide – even if only a trace amount – may remain on the landscape. Indeed, pesticides are often registered and approved with an understanding that residuals are part of the application process. Even where pesticide is applied only to dry land, residuals can ultimately find their way into waters of the U.S. through forces such as wind and stormwater runoff. Pesticide can also fall or be blown by wind during application into ditches (including dry ditches), streams, or other features that may qualify as waters of the U.S. under the Court's January 7 ruling, many of these otherwise-lawful pesticide applications will require an NPDES permit.

8. Farmers are concerned about the effect of the Court's ruling and how it could interject a regulatory and permitting system into the very precise technical and science-based process of effectively utilizing pesticides. Farmers use pesticides for the purpose of keeping our food supply safe by preventing infestations and crop losses from weeds, insect pests, and disease. Any delay in applications can result in less effective crop protection, the spread of pests and disease, and a significant reduction in the efficacy of crop production tools. Farmers need the flexibility to use the appropriate pesticide applied at appropriate rates – a task that farmers fear would be unduly complicated by an additional layer of gov-

ernment involvement and NPDES permit restrictions. In fact, United States Department of Agriculture ("USDA") Secretary Thomas Vilsack and the National Association of State Departments of Agriculture ("NASDA") have expressed similar concerns about the implications of the Court's ruling for American agriculture. *See* Letter from USDA Secretary Thomas J. Vilsack to EPA Administrator Lisa P. Jackson (Mar. 6, 2009) (true copy at Exhibit A); Letter from NASDA President Ron Sparks to EPA Administrator Lisa P. Jackson (Apr. 7, 2009) (true copy at Exhibit B).

9. Methods of pesticide application vary depending on several factors. For example, because ground applicators can become stuck in mud during wet conditions, causing environmental harm to the land, farmers sometimes must turn to aerial applications. Sometimes farmers can spot treat with ground equipment to prevent an infestation from spreading, but often aerial spraying is needed for entire fields or regions when pest and disease outbreaks threaten to expand exponentially in a matter of hours. Thus, on-the-ground conditions may require immediate action and may dictate certain methods of application for successful pest control.

10. The timing of a pesticide application is probably the most important factor in effective crop protection. If farmers are to use pesticides effectively to save crops, they must have the flexibility to act quickly, without the need to wait for government approval before application. Once a weed, insect, or disease on a crop reaches a certain size, the range of available pesticide options can change significantly. While small outbreaks of insects or weeds can often

be eliminated, large ones often cannot. In addition, early detection and control can be essential to avoiding crop loss, because advanced outbreaks often result in total crop failure.

11. The type of crop to be protected is also important. Certain crops cannot be harvested within a time period after treatment. For this reason, pre-harvest intervals can dictate the timing of pesticide application.

12. Pest and disease outbreaks are not always easy to predict. Farmers who are fortunate have a known and fixed set of pests and weeds they know must be controlled every year. In this narrow circumstance, the farmer meets with certified crop advisors through local extension offices, which advise the farmer on product options and application timing and methods. For most farming operations, pests and disease do not follow a set pattern that can be scheduled in advance. There are timing issues, and application methods, that change by the hour and day.

13. In my experience, most farmers at least occasionally face unforeseen and unpredictable pest control needs. In fact, the pests, insects, and disease infestations that are most devastating to crops are unpredictable. For example, army worms, corn bores, and boll weevils are unpredictable pests that can devastate crops in a short period of time. Under favorable climactic conditions, these pests will multiply quickly and require immediate corrective action to destroy the pests before they destroy the crop. Army worms, capable of defoliating everything in their path, thrive in hot dry conditions found during parts of the year in the Southern States. The worms

eat corn, peanut, cotton, soybeans, and any vegetative growth. Once the worm is discovered, a farmer only has hours or at most days to respond with the appropriate chemical or the crop is lost. NPDES permitting requirements to spray for such an outbreak would very likely delay the farmer's action under these very common circumstances. Farmers who find such infestations will not have days, weeks, or months to obtain an NPDES permit. Nor would the farmer have the necessary information in advance of an outbreak (application rates, times, and climactic conditions) to seek a permit.

14. For vegetable producers, the threat from disease can have impacts that last much longer than just the immediately diseased crop. Phytophora blight is one of the most destructive diseases affecting vegetable plants and can leave a residual contamination of the soil that leaves the soil unproductive for years. A farmer who detects Phytophora blight cannot be delayed by permit requirements without serious crop losses for years to come.

15. Other pests, such as corn ear worms, if not controlled, lead to diseases such as Aflatoxin. This leads to human safety and food safety concerns. Outbreaks of diseases, such as wheat rust or soybean rust, if not controlled in a timely manner will lead to quarantines, embargos, and significant shifts in world trade.

16. Delays resulting from permit requirements would increase the risk of wide-spread outbreaks that could have been prevented by the first farmers affected. Farmers depend on their neighbors to act quickly to protect crops from infestations and disease. For example, soybean rust, once identi-

fied, must be treated immediately because it spreads through the wind to other farms. The entire farming community in vulnerable areas must actively look for signals of disease because it can spread across an entire region and several states in a matter of hours.

17. From the farmer's perspective, pesticides are costly, but often necessary. For some farmers, the best option is to use natural methods of pest control before turning to chemicals. One commonly used scientific methodology for controlling pests is called "Integrated Pest Management" (IPM). Under IPM, farmers balance pest populations and use "just-in-time" production management techniques to maximize the use of "natural" preventative pest control. This minimizes pesticides and controls pests and disease. However, in order to minimize the use of pesticides, IPM requires quick action within hours, not delay, once preventative methods fail. Otherwise, the pest will multiply and more pesticides will be needed to control the greater threat, defeating the purpose of IPM. IPM users are dedicated to minimizing pesticides unless nature fails. For these reasons, IPM would be complicated or rendered ineffective by NPDES permit requirements.

18. The use of IPM may be jeopardized by NPDES permitting. Farmers will be forced to use pesticides at the maximum rate allowed under the permit to avoid the risk of crop loss associated with a sudden and unexpected insect or disease outbreak.

19. Adding another regulatory requirement will slow real time production decisions made by farmers every day. Waiting for a regulatory approval for unanticipated pest control needs will lead to the loss of crops because farmers will not have the

flexibility to make daily, hourly decisions on how to protect their crops. Ironically, delays will also likely lead to the use of more pesticides to control larger weed, pest, and disease infestations. A small worm or weed takes less pesticide to control than a large one.

20. Increased regulatory requirements for pesticide application will push farmers to seek less heavily regulated options for controlling pets whenever and wherever possible. For example, as NPDES permits increase the cost of controlling weeds with pesticides, farmers will be driven to use mechanical methods to control weeds where possible. Today, farmers use "no till" weed control on half of the nation's cropland. This method of production reduces soil loss from erosion, increases organic carbon storage in the soil (decreasing greenhouse gas emissions), and requires the use of herbicides rather than a plow to control weeds. Today, over 172 million acres are farmed using no till. Permits and the threat of Clean Water Act citizen suits, however, will result in fewer no till farms, more mechanical plowing, more soil erosion, increased releases of the soil's organic carbon.

21. Based on my experienced with other EPA NPDES permit requirements for agriculture (such as NPDES permits for animal feeding operations), I am greatly concerned about the time it could take to develop NPDES permits for pesticide application in the first instance. Even if EPA and the States develop "general permits," such permits often take months or even years to develop. Lawsuits, such as the lawsuit that followed California's recent issuance of a general permit for aquatic pesticides

for vector control, will likely further delay permit issuance.

22. Most farming operations, however, face a host of pests and diseases that require a flexible response in order to save the crop. The needs of a farmer vary by region, climate, and crop and do not fall neatly into categories. Based on my experience with pesticide applications and NPDES permits in other agricultural areas, I have great concern that the regulatory restrictions of an NPDES permit will prevent effective pest control.

I declare under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, and that this declaration was executed on this 3 day of April, 2009 at 4:20 pm.

/s/ Don Parrish

EXHIBIT A

March 6, 2009

The Honorable Lisa P. Jackson
Administrator
U.S. Environment Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Subject: The National Cotton Council of America, et al., v. United States Environmental Protection Agency,
Nos. 06-4630; 07-3180/3181/ 3182/3183/ 3184/3185/ 3186/3187/3191/3236
(6th Cir. Jan. 7, 2009).

Dear Ms. Jackson:

The United States Court of Appeals for the Sixth Circuit recently invalidated the Environmental Protection Agency's (EPA's) Final Rule entitled, "Application of Pesticides to Waters of the United States in Compliance With FIFRA." 71 Fed. Reg. 68,483 (Nov. 27, 2006) (Final Rule). A petition for rehearing or for rehearing en banc before the Sixth Circuit is due on April 9, 2009. I would very much appreciate your taking into consideration the significant adverse effect that the court's decision will have on American farmers, as well as on U.S. Department of Agriculture (USDA) agencies, and therefore request that you seek further review of this decision by the Sixth Circuit.

In its Final Rule, the EPA reasonably interpreted the term "pollutant" in the Clean Water Act (CWA)

as generally excluding pesticides that are applied in compliance with the relevant requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The Final Rule established that the application of pesticides in compliance with FIFRA would not require a National Pollutant Discharge Elimination System (NPDES) permit when they are applied directly into waters of the United States in order to control pests, or when they are applied to control pests that are present over waters of the United States, including near those waters, when a portion of the pesticides unavoidably will be deposited into the water in order to target the pests effectively. The EPA specifically concluded that the terms "chemical wastes" and "biological materials" in the CWA's definition of pollutants do not encompass the types of pesticide applications addressed in the Final Rule. 71 Fed. Reg. 68,486.

The Court of Appeals for the Sixth Circuit concluded that the Final Rule was contrary to the plain language of the CWA. Although the court agreed with the EPA that chemical pesticides applied directly to water to perform a useful purpose are not chemical wastes, it held that excess pesticides and pesticide residue meet the common definition of waste, and therefore are pollutants under the CWA. The court held that the EPA is required to regulate the residue of chemical pesticides when the pesticide is applied to land or air, and the residue finds its way into the navigable waters of the United States, and when the pesticide is applied directly to the water and the residue has a lasting effect beyond its intended purpose. The court also found that Congress intended for "biological materials" to encompass more than "biological wastes." The court held that all biological

pesticides are biological materials, and therefore pollutants under the CWA.

The court's adverse decision will have profound implications for American farmers. The panel's ruling effectively broadens the potential application of the CWA to reach agricultural activities that the EPA has never regulated under the provisions of the CWA. By broadening the Act's reach, the court burdens American agriculture with a newly minted NPDES permit requirement for the application of all FIFRA-compliant biological pesticides whenever those pesticides might find their way into waters of the United States, and for all FIFRA-compliant chemical pesticides whenever the residues of those pesticides find their way into waters of the United States. The permit requirement could reach almost any pesticide application, requiring farmers to navigate a permitting system that is ill-suited to the demands of agricultural production. Failure to obtain a timely permit for pesticide application could cripple American farmers' emergency pest management efforts and hamper their ability to respond quickly to new pest infestations or threats of infestations, thus increasing the risk of crop losses.

Additionally, several USDA agencies engage in the ground and aerial application of pesticides, and would be adversely affected by the panel's decision. The Forest Service (FS) and the Animal and Plant Health Inspection Service (APHIS) now will be required to obtain NPDES permits, which could compromise the agencies' ability to respond with efficiency and flexibility to emerging threats and emergency situations. The delay and expense associated with complying with the NPDES permitting re-

quirement could substantially curtail the agencies' use of pesticides. For the FS, this could result in diminished efforts to protect the National Forests from pest infestation and could potentially increase the risk and severity of wildfires. It could also significantly hamper aerial spraying programs such as APHIS's Mormon Cricket and Grasshopper Program, undertaken in cooperation with western states. Additionally, research programs involving both the conventional and the experimental applications of pesticides undertaken by the Agricultural Research Service (ARS) also will be detrimentally affected by the panel's decision. The time-consuming and costly process of negotiating the NPDES permit application process will diminish the efficiency with which the ARS will be able to undertake its initiatives, and may, in some instances, curtail the agency's projects entirely.

The Sixth Circuit's decision encumbers the American farmers' and the agencies' ability to do business, while reaping little or no environmental benefit in exchange. Subjecting FIFRA-compliant pesticides to the additional regulatory regime of the CWA is duplicative and will not help protect the environment. FIFRA mandates that the EPA approve and issue a registration for a pesticide product only after the EPA has determined that the product will not cause "unreasonable adverse effects on the environment." The pesticide registration and re-registration process under FIFRA considers the effects of pesticides on both human health and aquatic resources. If the EPA has concluded that a pesticide satisfies FIFRA and will not have an "unreasonable adverse effect on the environment," then it is reasonable to exclude

the application of that pesticide from the permitting requirements of the CWA.

In short, I am concerned that the court's decision will compromise American farmers' and USDA agencies' ability to respond efficiently and effectively to emergency threats, while providing little or no additional environmental protection in return. Thank you for taking these issues into account as you consider seeking further review of this case.

Sincerely,

Thomas J. Vilsack
Secretary

EXHIBIT B

April 7, 2009

Honorable Lisa Jackson,
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Jackson:

The National Association of State Departments of Agriculture (NASDA) is writing to express our concern about a recent federal appeals court ruling which vacates the Environmental Protection Agency's (EPA) 2007 regulations exempting certain pesticide applications from Clean Water Act (CWA) permitting requirements.

NASDA represents the commissioners, secretaries, directors of the state departments of agriculture in the fifty states and four territories. Our members are partners and co-regulators with EPA as the lead state agencies responsible for administering, implementing and enforcing the laws regulating the production, labeling, distribution, sale, use and disposal of pesticides.

NASDA and the state departments of agriculture strongly urge you to file a request to the 6th Circuit Court for a rehearing and, if that request is denied, appeal the case to the United States Supreme Court.

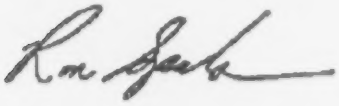
The Court's ruling basically decided that any pesticide application near, over, or in water could constitute "pollutant discharges" under the Clean Water Act. The Court noted there are situations where excess pesticide or residue would meet the definition of "chemical waste" under the Clean Water Act: (1) where chemical pesticides are applied to land or air, and excess pesticides are deposited into waters of the United States, and (2) where pesticide residue remains following direct application of pesticides to the jurisdictional waters. The state departments of agriculture firmly believe that both statements by the Court are in direct conflict with the agriculture exemptions in the Clean Water Act.

NASDA members are extremely concerned about the potential and serious impacts the court's ruling could have on agricultural production across the country. By extending the Court's decision to terrestrial applications, the Court has placed farmers in legal jeopardy under the Clean Water Act's citizen-action provisions. Unless EPA appeals the decision, farmers will go into the next growing season under the threat of lawsuits. Furthermore, NASDA has significant concerns that EPA currently has no permitting system in place to deal with this situation. We question whether the agency has the resources and funding to handle the potentially large volume of permits that would be required. If the court's ruling is not overturned, it would impose a series of unnecessary, redundant, costly and burdensome requirements on agricultural producers. In addition, court's decision can be construed to apply to non-agricultural/non-pesticide applications and emissions, including spraying for mosquito control,

vegetation management, and chemical deicing of roads and highways.

Again, due to the potentially significant ramifications of this court decision to U.S. agriculture, NASDA strongly urges you to file a petition for rehearing.

Sincerely yours,



Ron Sparks
NASDA President
Commissioner, Alabama Department of Agriculture & Industries

Nos. 09-533 and 09-547

In the Supreme Court of the United States

CROPLIFE AMERICA, ET AL., PETITIONERS

v.

BAYKEEPER, ET AL.

AMERICAN FARM BUREAU FEDERATION, ET AL., PETITIONERS

v.

BAYKEEPER, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
THOMAS LORENZEN
ALAN GREENBERG
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

This case involves a challenge to a regulation promulgated by the Environmental Protection Agency (EPA). The EPA's responsibilities include the administration of both the Clean Water Act (CWA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The challenged EPA rule interpreted the CWA not to require permits for the application of pesticides, in a manner consistent with the relevant requirements of the FIFRA, either directly to waters of the United States or over, including near, such waters to control pests. The question presented is as follows:

Whether the court of appeals erred in concluding that the text of the CWA unambiguously foreclosed EPA's rule.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 2
Statement 2
Argument 9
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Altman v. *Town of Amherst*, 47 Fed. Appx. 62 (2d Cir. 2002) 5

Association to Protect Hammersly, Eld, & Totten Inlets v. *Taylor Res., Inc.*, 299 F.3d 1007 (9th Cir. 2002) 12

Burlington N. & Santa Fe Ry. v. *United States*, 129 S. Ct. 1870 (2009) 13

Chevron, U.S.A., Inc. v. *NRDC*, 467 U.S. 837 (1984) 7

Cordiano v. *Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009) 13, 14, 15

Fairhurst v. *Hagener*, 422 F.3d 1146 (9th Cir. 2005) 5

Headwaters, Inc. v. *Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) 4

League of Wilderness Defenders/Blue Mountains Biodiversity Project v. *Forsgren*, 309 F.3d 1181 (9th Cir. 2002) 4

No Spray Coalition, Inc. v. *City of New York*, 351 F.3d 602 (2d Cir. 2003) 5

Statutes and regulations:

Clean Water Act, 33 U.S.C. 1251 *et seq.* 2

Statutes and regulations—Continued: Page

33 U.S.C. 1311(a) 2
33 U.S.C. 1342 3
33 U.S.C. 1342(a)(1) 3
33 U.S.C. 1361(a) 3
33 U.S.C. 1362(6) 2, 10
33 U.S.C. 1362(12) 2
33 U.S.C. 1362(14) 2
Federal Insecticide, Fungicide, and Rodenticide Act, Pub. L. No. 92-516, 86 Stat. 973 3
7 U.S.C. 136(bb) 4
7 U.S.C. 136a(c) 4
7 U.S.C. 136a(c)(5) 3
40 C.F.R.:
Pt. 122:
Section 122.3 ..... 3, 6
Section 122.3(h) 7
Section 122.28 3
Pt. 152 4
Pt. 156 4
Pt. 158 4

Miscellaneous:

68 Fed. Reg. (2003):
p. 48,385 ..... 5, 6
p. 48,387 ..... 5, 6
70 Fed. Reg. (2005):
p. 5093 6
pp. 5095-5096 6

Miscellaneous—Continued: Page

71 Fed. Reg. (2006):
p. 68,483 6
p. 68,486 12
p. 68,487 ..... 7, 10
p. 68,492 ..... 6, 7

In the Supreme Court of the United States

No. 09-533

CROPLIFE AMERICA, ET AL., PETITIONERS

v.

BAYKEEPER, ET AL.

No. 09-547

AMERICAN FARM BUREAU FEDERATION, ET AL., PETITIONERS

v.

BAYKEEPER, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 553 F.3d 927.[1]

[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 09-533.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2009. A petition for rehearing was denied on August 3, 2009 (Pet. App. 64a-65a). The petitions for a writ of certiorari were filed on November 2, 2009 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since the enactment of the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, in 1972, the Environmental Protection Agency (EPA) has not required persons applying pesticides directly to or over waters of the United States for the purpose of controlling pests to obtain a CWA permit. That longstanding practice was codified in the 2006 EPA final rule at issue in this case. Pet. App. 26a-63a.

a. CWA Section 301(a) states that "the discharge of any pollutant by any person shall be unlawful" unless the discharge is in compliance with certain other provisions of the Act. 33 U.S.C. 1311(a). The Act defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). The Act defines the term "pollutant," in turn, as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. 1362(6). A "point source" is a "discernible, confined and discrete conveyance." 33 U.S.C. 1362(14).

The primary way that a person may discharge a pollutant without running afoul of the Act is to obtain a per-

mit pursuant to CWA Section 402, 33 U.S.C. 1342, which establishes the National Pollutant Discharge Elimination System (NPDES). Subject to certain conditions, EPA and approved States "may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants." 33 U.S.C. 1342(a)(1). In addition to individual NPDES permits, EPA issues general permits that can cover entire classes of discharges by similarly situated dischargers. Dischargers who comply with the terms of the general permit, including specified technology and water-quality-based effluent limitations, do not require individual permits for any discharges within the covered class. 40 C.F.R. 122.28.

Congress authorized EPA to promulgate regulations to administer the NPDES program. 33 U.S.C. 1361(a). EPA regulations include a list of discharges that do not require NPDES permits. 40 C.F.R. 122.3.

b. Three days after Congress enacted the CWA, it passed comprehensive amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), Pub. L. No. 92-516, 86 Stat. 973, which regulates the sale, distribution, and use of pesticides through a registration program. Before registering a pesticide, EPA must determine, *inter alia*, that the pesticide "will perform its intended function without unreasonable adverse effects on the environment," and that "when used in accordance with widespread and commonly recognized practice [the pesticide] will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. 136a(c)(5). FIFRA defines the term "unreasonable adverse effects on the environment" to include "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and

benefits of the use of any pesticide," including water-quality and other ecological effects. 7 U.S.C. 136(bb). If there are risks of concern, EPA considers which mitigation measures (*e.g.*, establishing a buffer between the area sprayed and a water body, or lowering the proposed application rate to reduce toxicity to non-target species) are necessary to reduce those risks. In performing the FIFRA analysis, EPA examines, *inter alia*, the ingredients of a pesticide, the intended type of application site and directions for use, and supporting scientific studies. 7 U.S.C. 136a(c); see 40 C.F.R. Pts. 152, 156, 158.

2. Since 2000, several cases in the Second and Ninth Circuits have raised the question whether the CWA requires NPDES permits for certain pesticide applications. Although the Ninth Circuit held in two cases that a pesticide applicator was required to obtain an NPDES permit, neither decision contained a square holding interpreting the term "pollutant" in a manner inconsistent with the EPA rule that is at issue in this case. See *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F.3d 526, 532-533 (2001) (determining chemical residue from herbicide application to be a pollutant, but without analyzing whether it constituted point-source pollution); *League of Wilderness Defenders/Blue Mountains Biodiversity Project* v. *Forsgren*, 309 F.3d 1181, 1184 n.2 (2002) (assuming that the parties did not dispute that insecticide applied above navigable waters qualified as a pollutant); see also Pet. App. 49a-51a. In 2005, the Ninth Circuit, relying in part on EPA's interim interpretation, held that chemical "pesticides that are applied to water for a beneficial purpose and in compliance with FIFRA, and that produce no residue or unintended effects, are not 'chemical wastes,' and thus are not 'pollut-

ants' regulated by the CWA." *Fairhurst* v. *Hagener*, 422 F.3d 1146, 1150-1151 (2005). Neither of the pertinent Second Circuit decisions reached the merits of the question presented in this case, let alone foreclosed EPA from interpreting the Act not to require permits for the type of pesticide applications at issue. Indeed, one of those decisions essentially called on EPA to resolve the issue. See *Altman* v. *Town of Amherst*, 47 Fed. Appx. 62, 67 (2002) ("Until the EPA articulates a clear interpretation of current law—among other things, whether properly used pesticides released into or over waters of the United States can trigger the requirement for NPDES permits * * * —the question of whether properly used pesticides can become pollutants that violate the CWA will remain open."); *No Spray Coalition, Inc.* v. *City of New York*, 351 F.3d 602, 605-606 (2003) (reserving the "complex question" whether a pesticide application to waters of the United States constitutes a CWA discharge of a pollutant).

Taken together, those decisions created uncertainty among the regulated community and other affected citizens about the applicability of the NPDES permit program to certain pesticide applications. Pet. App. 30a-32a. In 2003, EPA sought to resolve that uncertainty by addressing the issue administratively. See 68 Fed. Reg. 48,385 (2003). In an Interim Statement and Guidance, EPA identified two circumstances for which it had concluded that pesticides applied to waters of the United States consistent with all relevant requirements of FIFRA are not "pollutants" under the CWA and therefore do not require an NPDES permit. *Id.* at 48,387. The first circumstance was the application for pest-control purposes of pesticides directly to waters protected by the CWA. *Ibid.* The second circumstance was the

application of pesticides to control pests that are present over waters of the United States where the application results in a portion of the pesticides being deposited to covered waters. *Ibid.*

EPA solicited public comment on the Interim Statement and Guidance. 68 Fed. Reg. at 48,385. After considering the public comments, EPA issued a final Interpretive Statement confirming its interim position. 70 Fed. Reg. 5095-5096 (2005). At the same time, EPA published notice of a proposed rulemaking to incorporate the substance of the Interpretative Statement into EPA regulations, and it solicited public comment on the proposed rulemaking. *Id.* at 5093.

On November 27, 2006, EPA issued its final rule. 71 Fed. Reg. 68,483. The rule revised EPA's NPDES regulations to add a paragraph to the list of discharges in 40 C.F.R. 122.3 that do not require NPDES permits. 71 Fed. Reg. at 68,492. The rule covered the application of pesticides, "consistent with all relevant requirements under FIFRA (*i.e.*, those relevant to protecting water quality)," in the following two circumstances:

1. The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds, or other pests that are present in waters of the United States.

2. The application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; for example, when insecticides are

> aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over or near water for control of adult mosquitoes or other pests.

Ibid. (40 C.F.R. 122.3(h)).

EPA further concluded that "if there are residual materials resulting from pesticides that remain in the water after the application and its intended purpose (elimination of targeted pests) have been completed, these residual materials are * * * pollutants under CWA section 502(6) because they are wastes of the pesticide application." 71 Fed. Reg. at 68,487. EPA explained, however, that such applications "do not require NPDES permits" because, "while the discharge of the pesticide is from a point source (generally a hose or an airplane), it is not a pollutant at the time of the discharge. * * * Instead, the residual should be treated as a nonpoint source pollutant." *Ibid.*

3. After various parties petitioned for review of EPA's rule in 11 different courts of appeals, the petitions were consolidated in the Sixth Circuit. Applying the principles set forth in *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984), the court of appeals vacated the rule. Pet. App. 1a-25a.

a. The court of appeals stated that the first question under *Chevron* is whether the CWA unambiguously includes pesticides within its definition of "pollutant." Pet. App. 14a. The court interpreted the term "chemical waste," part of the Act's definition of "pollutant," to include discarded, superfluous, or excess chemicals. *Id.* at 16a. Applying that interpretation, the court concluded that so long as a chemical pesticide is intentionally applied to waters to perform a useful purpose and leaves

no excess portions after performing its intended purpose, it is not a "pollutant" and therefore does not require an NPDES permit. *Ibid.* At the same time, the court concluded that excess chemical pesticide and pesticide residue—*i.e.*, any portions of the pesticide that remain in the water after the pest-control purpose has been served—"unambiguously fall within" the term "chemical waste" and therefore are "pollutant[s]" under the CWA. *Id.* at 16a-18a.

EPA had recognized that excess or residual portions of a discharged pesticide are "pollutant[s]" within the meaning of the CWA. The agency had concluded, however, that the application of a pesticide that leaves such a residue does not require a CWA permit because such portions are neither excess nor residual (and therefore are not "pollutant[s]") at the time of the discharge. EPA contended that such residues are properly viewed as non-point source pollutants. The court of appeals rejected that conclusion, finding it contrary to the CWA's plain language and purpose. The court held that, when pesticide discharges result in the entry of excess or residual portions into waters of the United States, those discharges require a permit because excess or residual pesticides are pollutants discharged from a point source, as they are introduced into the water by the applicator from a point source. Pet. App. 21a-24a.

b. The court of appeals also addressed the question whether the term "biological materials," another component of the CWA definition of "pollutant," includes biological pesticides applied to control pests. Pet. App. 18a-20a. Citing the dictionary definition of "material," the court concluded that the "plain, unambiguous nature" of the statutory text compelled the conclusion that biological pesticides qualify as biological materials. *Id.*

at 18a-19a. The court of appeals also relied on Congress's use of the term "biological *materials*," rather than "biological *wastes*," to justify the court's different treatment of biological and chemical pesticides. *Id.* at 19a-20a (emphasis added).

4. EPA moved to stay the mandate for two years in order to avoid significant disruption to (i) EPA and those States that administer NPDES permit programs, and (ii) the thousands of persons and businesses nationwide who apply pesticides to or over, including near, waters protected by the CWA. EPA explained that the stay would provide it and state permitting authorities time to develop and issue general CWA permits containing appropriate terms to govern the discharge of pesticides to covered waters in a more administratively workable manner. Pet. App. 105a-123a. The court of appeals granted EPA's motion and stayed issuance of the mandate until April 9, 2011.

ARGUMENT

Petitioners contend that the court of appeals disregarded settled principles governing the deference owed to agency interpretations, and that the court's construction of the CWA is in tension with decisions of this Court and other courts of appeals. 09-533 Pet. 14-22; 09-547 Pet. 13, 20, 25-28. Although the government agrees that the court of appeals misapplied *Chevron* to EPA's 2006 rule, the Sixth Circuit's ruling does not conflict with any decision of this Court or another court of appeals. And while the decision below potentially applies to thousands of applications of pesticides to or over, including near, waters protected by the CWA, the court of appeals' two-year stay of its mandate has provided time to EPA and authorized States to mitigate the administrative burdens

resulting from the decision. Indeed, EPA is currently in the process of developing general permits governing the types of pesticide applications covered by its rule. Further review is therefore unwarranted.

1. Although the court of appeals recited the correct standard of review under *Chevron* (Pet. App. 9a-10a), it misapplied that standard to EPA's rule. Contrary to the court of appeals' conclusion, the relevant CWA terms do not unambiguously foreclose EPA's interpretation. Congress defined the term "pollutant" to encompass 16 specific items. 33 U.S.C. 1362(6); see p. 2, *supra*. None of the 16 items clearly encompasses pesticides applied to waters, in a manner consistent with FIFRA requirements, in order to control pests. In particular, Congress's use of the terms "chemical wastes" and "biological materials" does not indicate a clear intent to cover the application of pesticides to covered waters under the circumstances specified in EPA's rule.

a. Although the court of appeals viewed the term "chemical waste" as unambiguous and therefore did not rely on EPA's interpretation as reflected in the 2006 regulation, the court's construction of that term with respect to chemical pesticides is consistent with EPA's rule. Both EPA and the court of appeals determined that pesticides intentionally applied to or over, including near, water to perform a particular useful purpose (*i.e.*, control pests) are not chemical wastes if they leave no residue after performing their intended purpose. See 71 Fed. Reg. at 68,487; Pet. App. 16a-17a. Both EPA and the court further concluded that any pesticide residue remaining in the water after the intended purpose has been served constitutes "chemical waste" and is therefore a "pollutant" within the meaning of the CWA. *Ibid.*

The court of appeals departed from EPA's 2006 rule, however, when it concluded that the CWA unambiguously classifies excess or residual pesticide as a pollutant discharged from a point source. The court of appeals stated that "it is clear that under the meaning of the Clean Water Act, pesticide residue or excess pesticide * * * is a pollutant discharged from a point source because the pollutant is introduced into a water from the outside world by the pesticide applicator from a point source." Pet. App. 23a-24a (internal quotation marks omitted). The court rejected EPA's conclusion that, because such an excess or residue becomes a "chemical waste" (and therefore a "pollutant") only at some time after discharge, it should be treated as a nonpoint source pollutant. Compare *id.* at 21a-25a, with 71 Fed. Reg. at 68,487; see p. 7, *supra*.

Thus, the critical question is whether the portion of a chemical pesticide that ultimately becomes excess or residue is a "pollutant" at the time it is released from the point source, or whether it becomes a "pollutant" only after the pesticide has served its intended purpose and the excess takes on the character of "waste." The court of appeals identified no provision of the CWA that speaks directly to that question. The court's conclusion that the CWA unambiguously foreclosed EPA's interpretation—notwithstanding the Act's silence as to the temporal issue of when such pesticide loses its character as product and becomes a pollutant; EPA's past practice of not requiring permits for such discharges (p. 2, *supra*); and FIFRA's specific regulation of pesticide use (pp. 3-4, *supra*)—reflects an erroneous application of *Chevron*.

b. The court of appeals also erred in holding, contrary to EPA's rule, that the CWA term "biological ma-

terials" unambiguously encompasses biological pesticides. Pet. App. 18a-20a. As the Ninth Circuit previously concluded, the CWA is ambiguous on whether that term, read in conjunction with the other items specified in the definition of "pollutant," includes *all* biological material (waste or not) within its scope. See *Association to Protect Hammersly, Eld, & Totten Inlets* v. *Taylor Resources, Inc.*, 299 F.3d 1007, 1016 (2002) (holding that natural byproducts of live mussels grown on harvesting rafts were not "biological materials"). The court below nevertheless found clear congressional intent to include biological pesticides within the term "biological materials," even though few biological pesticides existed at the time Congress adopted this definition. Compare Pet. App. 18a-19a, with 71 Fed. Reg. at 68,486. The court of appeals' decision also creates the peculiar result that, although a chemical pesticide (except for excess or residue) applied to waters for pest control is not a "pollutant," a biological pesticide applied to the same waters in the same manner for the same purpose is a "pollutant." That result is particularly anomalous in light of EPA's assessment that biological pesticides generally pose less serious adverse environmental consequences than chemical pesticides. *Ibid.*; see Valent Biosciences Amicus Br. 11-12.

c. Notwithstanding the court of appeals' errors, the decision below does not warrant this Court's review. The court of appeals recited the correct standard under *Chevron* and did not purport to articulate a new analytic framework for review of agency rules. Pet. App. 9a-10a. The result below does not conflict with a decision of this Court or any other court of appeals. The court below was the first to review the validity of EPA's 2006 final rule, and no court of appeals has held that pesticide ap-

plications to navigable waters resulting in chemical residue or involving biological pesticides do not require an NPDES permit. See pp. 4-5, *supra*. And, as explained below (pp. 15-16, *infra*), EPA is in the process of fashioning a regulatory response to mitigate the impact of the court of appeals' decision.

2. In addition to challenging the court of appeals' application of *Chevron* principles to EPA's rule, petitioners in No. 09-533 contend that the court's interpretation of the CWA term "chemical waste" conflicts with this Court's decision in *Burlington Northern & Santa Fe Railway* v. *United States*, 129 S. Ct. 1870 (2009), and with the Second Circuit's decision in *Cordiano* v. *Metacon Gun Club, Inc.*, 575 F.3d 199 (2009). Pet. 17-22. Petitioners' reliance on those decisions is misplaced.

In *Burlington Northern*, the Court interpreted the phrase "arrange for disposal" as used in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). Specifically, the Court held that a manufacturer had not "arrange[d] for disposal" of pesticide that had spilled during its transfer from the delivery truck to the customer's storage tanks. 129 S. Ct. at 1875-1879. Relying on the intent element implicit in the CERCLA term "arrange for," the Court explained that the manufacturer had not entered into the transaction with "the intention that at least a portion of the product be disposed of during the transfer process." *Id.* at 1880.

Although the purpose of a pesticide discharge is relevant to whether the discharge involves a "chemical waste" within the meaning of the CWA, this Court's decision in *Burlington Northern* does not speak directly to the question presented here. As discussed above (pp. 10-11, *supra*), the Sixth Circuit *agreed* with EPA's con-

clusion, as reflected in the 2006 rule, that chemical pesticides do not constitute "chemical waste" within the meaning of the CWA unless some excess or residue remains after the pesticide has accomplished its intended purpose. And nothing in *Burlington Northern* sheds meaningful light on whether such excess or residue has been discharged into covered waters from a point source. Moreover, the ultimate question whether there has been a "discharge of any pollutant" under the CWA differs on its face from the question whether someone has "arrange[d] for disposal" of a pollutant under CERCLA. For example, the spilled pesticide at issue in *Burlington Northern*, like the excess or residual pesticide discussed in the EPA rulemaking and in the decision below, would constitute a "pollutant" within the meaning of the CWA if it had been spilled into waters of the United States.

In *Metacon Gun Club*, the Second Circuit addressed a part of the definition of "solid waste" in the Resource Conservation and Recovery Act of 1976 (RCRA)— specifically the term "discarded material," which RCRA regulations define as "abandoned" by being "[d]isposed of." 575 F.3d at 206-207 (citations omitted). The plaintiffs had brought claims under both RCRA and the CWA arising from alleged lead contamination attributable to the firing of bullets at a shooting range. *Id.* at 202. The Second Circuit first determined under RCRA that lead shot used at a shooting range is not a "discarded material" and therefore is not a solid waste. *Id.* at 207-209. Petitioners emphasize the Second Circuit's inquiry into the ordinary, intended use of a product. 09-533 Pet. 20-21. As noted above, however, the Sixth Circuit's construction of the term "chemical waste" in the CWA is consistent with that in the EPA rule. In any event, the

Second Circuit did not reject the plaintiffs' CWA claims on the ground that lead shot used for its intended purposes is not a "pollutant." Rather, the court found no CWA liability for independent reasons, explaining that the plaintiffs had not established that certain discharges were from a point source or that other discharges were into waters of the United States. *Metacon Gun Club*, 575 F.3d at 222-225.

3. In arguing that the decision below warrants further review, petitioners emphasize the potentially widespread impact of the court of appeals' ruling. 09-533 Pet. 28-33; 09-547 Pet. 14-20. The court of appeals' decision will make the NPDES permitting regime applicable to thousands of pesticide applications that were not previously subject to CWA requirements. Pet. App. 106a-107a, 126a-127a. But because the court of appeals has stayed its mandate for two years to enable EPA and authorized States to develop and issue general permits, the regulatory burdens of the court of appeals' decision will be reduced.

Immediate issuance of the mandate by the court of appeals likely would have caused significant disruption to both regulators and the regulated community. EPA and the States that administer the NPDES program lack the resources to issue individual permits in a short timeframe. Without NPDES permits and without a stay of the mandate, the many persons and businesses nationwide who apply pesticides to or over, including near, waters of the United States would have faced a choice between ceasing such applications or risking CWA violations.

For that reason, the government sought a stay of the mandate from the court of appeals. As the government explained at the time, EPA and authorized States plan

to create NPDES permits to cover a large number of similarly situated dischargers in lieu of issuing an individual permit to each discharger for the type of pesticide applications addressed in EPA's rule. Pet. App. 127a-128a. EPA estimated that the development and issuance of general permits would take two years, and it therefore requested a stay of the mandate until April 9, 2011. *Id.* at 128a-129a.

The court of appeals' grant of that motion mitigates the potentially adverse consequences of its decision. The two-year period should provide EPA and other authorized permitting agencies sufficient time to develop and issue general CWA permits to cover the activities at issue. In light of the Sixth Circuit's stay of the mandate, there is no pressing need for this Court's review.[2]

---

[2] Petitioners also suggest that the opinion below could be read to extend the CWA's coverage to discharges having a more attenuated connection to waters of the United States than the discharges addressed in EPA's 2006 rule. 09-533 Pet. 29-30; 09-547 Pet. 15-17. The possibility that future plaintiffs might invoke the Sixth Circuit's decision in substantially different (and currently hypothetical) factual circumstances does not independently warrant this Court's review. In any event, the opinion below is better read as limited to the issues actually before the court of appeals: pesticide applications to or over, including near, waters of the United States that are covered by EPA's rule.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
IGNACIA S. MORENO
Assistant Attorney General
THOMAS LORENZEN
ALAN GREENBERG
Attorneys

JANUARY 2010

Nos. 09-533 and 09-547

In The Supreme Court of the United States

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On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

Of Counsel
CHARLES C. CALDART
NATIONAL ENVIRONMENTAL LAW CENTER
1402 Third Avenue, Suite 715
Seattle, WA 98101
206-568-2853

CHARLES M. TEBBUTT
Counsel of Record
LAW OFFICES OF CHARLES M. TEBBUTT
470 West Broadway
Eugene, OR 97401
541-344-8312

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

DANIEL E. ESTRIN
PACE ENVTL. LITIGATION CLINIC
PACE LAW SCHOOL
78 North Broadway
White Plains, NY 10603

REED W. SUPER
SUPER LAW GROUP LLC
156 William Street, Suite 800
New York, NY 10038

On The Brief:
JOSEPH J. MANN
NATIONAL ENVIRONMENTAL LAW CENTER

COUNTER STATEMENT OF QUESTIONS PRESENTED

Was the Sixth Circuit correct in concluding that the Clean Water Act disallows an administrative rule purporting to exempt from the Act's permitting scheme certain point source discharges of pesticides directly to or over waters of the United States, in light of the plain language, purpose, structure, and history of the Act?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Baykeeper, et al., with the exception of Saint John's Organic Farm, state that they are all nonprofit corporations that have no parent corporations or publicly held stock. Saint John's Organic Farm states that it has no parent corporations or publicly held stock.

TABLE OF CONTENTS

Page

COUNTER STATEMENT OF QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

COUNTER STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITIONS 5

I. THE SIXTH CIRCUIT'S OPINION IS HARMONIOUS WITH FEDERAL APPELLATE JURISPRUDENCE INTERPRETING THE CWA 6

II. THE COURT'S *CHEVRON* ANALYSIS WAS CORRECTLY PERFORMED 12

A. The Court Properly Held That Pesticide Applications That Result in Discharge of Chemical Waste Directly to Waters Are Subject to CWA Permitting 14

1. Excess and Residual Pesticide Materials Are "Chemical Wastes" Within the Meaning of the CWA 14

2. The Excess and Residual Pesticide Materials Are Added to Waters "From" Point Sources 16

3. Petitioners' Professed Concerns About the Reach of This Holding Are, at Best, Substantially Overblown 19

TABLE OF CONTENTS – Continued

Page

B. The Sixth Circuit Properly Held That Biological Pesticides Are Biological Materials 22

C. The CWA Does Not Exempt Pesticides From Its Purview 25

III. THE PRACTICAL EFFECT OF THE SIXTH CIRCUIT OPINION WILL NOT BE UNDULY DISRUPTIVE, AND WILL BENEFIT THE ENVIRONMENT AND PUBLIC HEALTH 30

A. Petitioners Vastly Overstate the Disruption That May Be Occasioned by NPDES Permitting for Aquatic Pesticides 30

B. The Permitting of Aquatic Pesticides Does Not Constitute "the Greatest Expansion" of the NPDES Program 32

C. NPDES Permitting Will Have Substantial Real-World Benefits, Consistent with the Act's Protective Goals 34

CONCLUSION 37

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

Appendix A – Amicus Brief of United States in *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) (No. 99-35373) ... App. 1

Appendix B – Draft Memorandum, United States Environmental Protection Agency. Current estimates of the number of applicators and applications of pesticides that fall within pesticide use patterns that result in the application of pesticides to and over, including near, waters of the United States. September 23, 2009 ..... App. 22

TABLE OF AUTHORITIES

Page

CASES

Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1976) 21

Arkansas v. Oklahoma, 503 U.S. 91 (1992) 23

Association to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007 (9th Cir. 2002) 24

Auer v. Robbins, 519 U.S. 452 (1997) 27

Burlington Northern and Santa Fe Railway Co. v. United States, 129 S.Ct. 1870 (2009) 2, 9, 10

Catskill Mountains Chapter of Trout Unlimited v. City of New York, 273 F.3d 481 (2d Cir. 2001) 7

Chevron USA, Inc. v. NRDC, 467 U.S. 837 (1984) 1, 12, 13

City of Chicago v. Environmental Def. Fund, 511 U.S. 328 (1994) 12, 13, 25

Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199 (2d Cir. 2009) 11

Demarest v. Manspeaker, 498 U.S. 184 (1991) 27

Department of Housing & Urban Dev. v. Rucker, 535 U.S. 125 (2002) 6

Entergy Corp. v. Riverkeeper, Inc., 129 S.Ct. 1498 (2009) 12, 13

Erlenbaugh v. United States, 409 U.S. 239 (1972) 29

TABLE OF AUTHORITIES – Continued

Page

Fairhurst v. Hagener, 422 F.3d 1146 (9th Cir. 2005) 8

Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001) 8, 27, 29, 31, 36

Hudson River Fishermen's Ass'n v. City of New York, 751 F. Supp. 1088 (S.D.N.Y. 1990), *aff'd*, 940 F.2d 649 (2d Cir. 1991) 18

Kentucky Waterways Alliance v. Johnson, 540 F.3d 466 (6th Cir. 2008) 23

League of Wilderness Defenders v. Forsgren, 309 F.3d 1181 (9th Cir. 2002) 8, 24

Long Island Soundkeeper Fund v. New York Athletic Club, 1996 WL 131863 (S.D.N.Y. 1996) 11

Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617 (8th Cir. 1979) 7

Monongahela Power Co. v. Marsh, 809 F.2d 41 (D.C. Cir. 1987) 29

Moskal v. United States, 498 U.S. 103 (1990) 25

National Ass'n of Home Builders v. Defenders of Wildlife, 127 S.Ct. 2518 (2007) 12

Natural Res. Def. Council ("NRDC") v. Costle, 568 F.2d 1369 (D.C. Cir. 1977) 6, 33

NRDC v. EPA, 859 F.2d 156 (D.C. Cir. 1988) 35

NRDC v. Southwest Marine, Inc., 236 F.3d 985 (9th Cir. 2000) 18

TABLE OF AUTHORITIES – Continued

Page

Northern Plains Res. Council v. Fidelity Expl. & Dev. Co., 325 F.3d 1155 (9th Cir. 2003) 24

Northwest Envtl. Advocates v. EPA, 537 F.3d 1006 (9th Cir. 2008) 33

Pittston Coal Group v. Sebben, 488 U.S. 105 (1988).....16

Rapanos v. United States, 547 U.S. 715 (2006).....7, 16

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).....29

Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996).....7

South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004).....7, 32

Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).....25

Train v. Colorado Public Interest Research Group, 426 U.S. 1 (1976) 22, 23

United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979) 7

United States v. Plaza Health Labs., Inc., 3 F.3d 643 (2d Cir. 1993).....23

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).....6

Williams v. Taylor, 529 U.S. 420 (2000).....13

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991).....5

TABLE OF AUTHORITIES – Continued

Page

STATUTES

7 U.S.C. § 136, *et seq.* 5
28 U.S.C. § 2112(a)(3).....8
33 U.S.C. § 1254(l).....28
33 U.S.C. § 1254(m).....28
33 U.S.C. § 1254(o).....28
33 U.S.C. § 1288 28
33 U.S.C. § 1342(a)(1).....6
33 U.S.C. § 1342(l)(i) 25
33 U.S.C. § 1344 23
33 U.S.C. § 1362 .....1, 3
33 U.S.C. § 1362(6).....6, 12, 22
33 U.S.C. § 1362(12).....6, 17
33 U.S.C. § 1362(14).....6, 12, 14, 21
33 U.S.C. § 1369(b).....8
42 U.S.C. § 6903(27).....11
42 U.S.C. § 9607(i).....25

REGULATIONS

40 C.F.R. Subchapter N (Parts 405-471) 33
40 C.F.R. § 261.2(a)(2)(i)(A).....11
40 C.F.R. § 261.2(b).....11

TABLE OF AUTHORITIES – Continued

Page

FEDERAL REGISTER

55 Fed. Reg. 47,990 (Nov. 16, 1990) 15

58 Fed. Reg. 45,008 (Aug. 25, 1993) 23

64 Fed. Reg. 46,012 (Aug. 23, 1999) 22

70 Fed. Reg. 5,093 (Feb. 1, 2005) 16

73 Fed. Reg. 33,697 (June 13, 2008) 17

LEGISLATIVE HISTORY

S. Rep. No. 92-414 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668 ..... 26, 36

S. Rep. No. 95-370 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4326 26

COUNTER STATEMENT OF THE CASE

Although Petitioners CropLife America, *et al.*, ("CropLife") and American Farm Bureau Federation, *et al.*, ("AFBF") labor mightily to characterize the Sixth Circuit's opinion below as worthy of review, this case has none of the important indicia of one meriting a grant of *certiorari*.

The case involves a straightforward issue of federal statutory construction – the meaning of "discharge of a pollutant" under the Clean Water Act ("CWA" or "the Act") – and whether this phrase clearly indicates that the direct release of potentially toxic pesticides into waters of the United States is to be governed by the Act's permitting program. In answering this question, the court below did not "flout" the *Chevron* doctrine, AFBF Pet. 13, ignore "contextual evidence or legislative history," CropLife Pet. 15, or "trample[ ] settled principles of judicial review," AFBF Pet. 20. Rather, it looked to the Act's own definitions of the key terms, interpreted the words in those definitions in accordance with their ordinary meaning, and then confirmed that the result was consistent with the purpose, structure, and history of the Act. Using this approach, the Sixth Circuit found that the Act's definition of "pollutant" plainly includes the excess and residual chemical and biological pesticides at issue, that these substances are added to water from the outside world by identifiable "point sources," and that the Environmental Protection Agency ("EPA") rule insulating such discharges from the Act's permit program was inconsistent both

with the plain language of the statute and with its underlying purpose.

The Sixth Circuit's opinion is perfectly in line with more than 35 years of federal jurisprudence addressing the purview of the Act's permit program generally, and its specific holding that certain point source pesticide discharges to waters of the United States are subject to the Act's permitting requirements is in accord with the holdings of three separate panels of the Ninth Circuit. Moreover, the Sixth Circuit's primary analysis is consistent with all but one of the statutory interpretations offered by EPA in the preamble to the rule. And on that one interpretation, as the court noted, EPA had departed not only from the plain language of the statute, but also from what the agency itself had recently characterized as "EPA's longstanding position." CropLife Pet.App. 23a.

Accordingly, although the pesticide industry argued vigorously below for *en banc* rehearing, EPA did not seek rehearing, and not a single judge on the Sixth Circuit -- a forum chosen by the pesticide industry itself to hear this case – called for a vote on rehearing. CropLife Pet.App. 64a. Petitioners' suggestion that the case must now be remanded in light of *Burlington Northern and Santa Fe Railway Co. v. United States*, 129 S.Ct. 1870 (2009) – a case they thought not important enough to call to the attention of the Sixth Circuit while their petition for rehearing was pending – does not bear up under even casual scrutiny.

Petitioners also are wrong in suggesting that EPA has held a consistent position on this issue since 1972. In 1999, the agency stated formally that, in line with its "consistent" historical interpretation, "[aquatic] pesticides containing pollutants may be discharged from point sources into the navigable waters only pursuant to a properly issued CWA permit." Res.App. 14. And while EPA did not itself issue permits for aquatic pesticide applications, it characterized this as a matter of "enforcement" discretion (not legal interpretation) as late as 2002. JA 91.[1] It was only after a strenuous lobbying effort by the pesticide industry that EPA took the position it did in the 2006 exemption rule. Tebbutt Decl. Supp. Envtl. Pet. Mot. Dismiss ¶¶ 2-3 (5/1/07).

Rather than seeking rehearing or petitioning for *certiorari*, EPA sought, and was granted, a two-year stay of the mandate so it can develop an effective CWA permitting program for aquatic pesticide applications. As EPA noted, this two-year stay will "allow EPA and authorized permitting authorities sufficient time to develop and issue Clean Water Act permits containing appropriate terms to govern the discharge of pesticide pollutants to waters of the United States." CropLife Pet.App. 108a-109a.

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[1] Citations to documents not in appendices to briefs to this Court are to the Joint Appendix (cited as "JA") used in the Sixth Circuit wherever possible, otherwise cites are to the document in the Sixth Circuit docket.

Petitioners' contention that this will be the "greatest" or "most dramatic" regulatory expansion in CWA history, AFBF Pet. 13; CropLife Pet. 29, is, at best, a vast exaggeration. The number of annual discharges that will be brought into the permitting fold under pesticide applicator permits is likely to be no larger than that associated with any of the scores of industrial categories already regulated under the Act's permitting scheme. Moreover, the Sixth Circuit opinion – like the EPA rule that it set aside – pertains only to discharges to or over waters. Not only are terrestrial (land-based) pesticide applications outside the scope of this opinion, but *agricultural* runoff and return flow (about which Petitioners profess to be particularly concerned) are statutorily exempted from the Act's permitting requirements altogether.

Petitioners' further claims that requiring permits for aquatic pesticide applications will promote disease, imperil the nation's food supply, and compromise national security are demonstrably false. Four states – California, Nevada, Oregon, and Washington – had implemented CWA permitting programs for aquatic pesticides prior to EPA's 2006 regulation, all without calamity. California urged EPA *not* to exclude aquatic pesticides from the Act's permitting requirements, noting that over one quarter of the state's waterways were already impaired by pesticide constituents. JA 142-43.

Finally, Petitioners' suggestion that an aquatic pesticide exemption from the CWA's permitting program should be *implied* from the existence of the

Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136, *et seq.*, is fundamentally inconsistent with the language and structure of the two statutes. As EPA stated in 1999, "[n]othing in FIFRA or the CWA remotely suggests that compliance with FIFRA also means compliance with the CWA." Res.App. 11. Rather, FIFRA is a screening statute that determines whether a pesticide may be introduced into commerce. It "does not occupy the field of pesticide regulation in general or the area of local use permitting in particular," and "certainly does not equate registration and labeling requirements with a general approval to apply pesticides." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 613-14 (1991).

At root, Petitioners' real complaint is that pesticide applicators now face systematic regulation under the Act. This fact, however, places them in no different position from all of the other private and public entities who have had to learn to live with – and ultimately prosper under – CWA regulation since the permit program was introduced in 1972 to clean up our nation's waters.

REASONS FOR DENYING THE PETITIONS

The petitions for a writ of *certiorari* should be denied because the Sixth Circuit's opinion conflicts with no opinion of this Court or of any court of appeals, and because it is faithful to the statute and to governing principles of statutory construction.

Moreover, the practical effect of the opinion will be no different from that of dozens of other circuit court decisions defining the regulatory reach of the CWA.

I. THE SIXTH CIRCUIT'S OPINION IS HARMONIOUS WITH FEDERAL APPELLATE JURISPRUDENCE INTERPRETING THE CWA.

The central regulatory feature of the CWA's program to protect the waters of the United States is the National Pollutant Discharge Elimination System ("NPDES") permitting system. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 319 (1982). An NPDES permit is required for "the discharge of any pollutant," 33 U.S.C. § 1342(a)(1), and the "discharge of a pollutant," in turn, is defined as "*any* addition of *any* pollutant to navigable waters from *any* point source," *id.* § 1362(12) (emphases added). *See generally Department of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) ("the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (citation omitted). The Act defines "point source" to mean "any discernable, confined[,] and discrete conveyance," and its definition of "pollutant" includes, *inter alia*, "chemical wastes" and "biological materials." 33 U.S.C. §§ 1362(6) & (14). The Act itself explicitly exempts certain discharges from the NPDES requirement, and EPA has no general authority under the statute to grant further exemptions. *See Natural Res. Def. Council ("NRDC") v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

The Sixth Circuit opinion here is wholly consonant with a long line of federal appellate decisions interpreting the scope of the NPDES program broadly to achieve the Act's substantive goals. *E.g., Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 565-66 (5th Cir. 1996); *cf. Rapanos v. United States*, 547 U.S. 715, 723 (2006) ("the discharge of a pollutant" and "pollutant" are "defined broadly").[2]

The opinion is also consistent with multiple appellate court holdings that Congress intended water pollution to be controlled through "point source" regulation whenever feasible, *e.g., United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979); that a point source "adds" a pollutant when it "introduces" that pollutant to the waters "from the outside world," *e.g., Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001); *cf. South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 103 (2004); and that there is no implied NPDES exemption for discharges made for allegedly beneficial purposes, *e.g., Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 627 (8th Cir. 1979).

Further, the Sixth Circuit's specific holding that NPDES permitting is required for the discharge of chemical pesticides that include excess or residual

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[2] As the Sixth Circuit noted, however, it "need not consider the . . . breadth" of the term "pollutant," since "§ 1362([6]) [is] unambiguous as to pesticides." CropLife Pet.App. 15a.

chemicals, and for the discharge of biological pesticides, is exactly the same conclusion reached by the only other court of appeals to address the issue. *See Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (NPDES permit is required for aquatic pesticide discharge because "residual" chemical pesticide left in water after aquatic application "qualifies as a chemical waste"); *Fairhurst v. Hagener*, 422 F.3d 1146, 1150-51 (9th Cir. 2005) (chemical pesticides that "produce no residue or unintended effects" are not pollutants, but aquatic pesticide application that will produce excess or residue requires a permit); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1185 (9th Cir. 2002) (biological pesticides are pollutants and their application over waters requires a permit).

Despite the unanimity of federal appellate jurisprudence supporting the Sixth Circuit's decision, Petitioners claim that "[a] more concrete circuit split is not possible," CropLife Pet. 2, because petitions for review of EPA's rule were filed in numerous circuits before being consolidated randomly in the Sixth Circuit. But many (if not most) challenges to EPA rulemaking efforts under the CWA are brought in multiple circuits, and there is no indication that Congress, by enacting the venue-determination provisions in 33 U.S.C. § 1369(b) and 28 U.S.C. § 2112(a)(3), meant for all such challenges to be resolved by this Court. Further, it is highly speculative to suggest that any of the other circuits in which petitions were filed would have come to a

conclusion different from that reached by the Sixth Circuit. Finally, given that the Ninth Circuit decisions discussed above implicated precisely the same legal propositions at issue in EPA's rule, a circuit split was indeed "possible" – it just did not materialize.[3]

Nor does this Court's opinion in *Burlington Northern* conflict with the Sixth Circuit's ruling, much less compel a remand. Although Petitioners emphasize that this "highly analogous" opinion was "issued after the Sixth Circuit's decision," CropLife Pet. 17, they omit that it was issued *before* the Sixth Circuit unanimously denied their then-pending petition for rehearing *en banc*. Petitioners could have called *Burlington* to the lower court's attention at that time (as they did two other intervening opinions, *see* Rule 28(j) Resp. (6/15/09); Rule 28(j) Resp. (7/13/09)), but chose not to do so.

In *Burlington Northern*, this Court rejected EPA's attempt to impose retroactive financial liability on a pesticide *seller* under a different federal statute – the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") – when a third party distributor stored and carelessly spilled that pesticide elsewhere. 129 S.Ct. at 1875. Contrary to Petitioners' assertion, the Court did not address the question of whether a pesticide can be a "waste" when "serving its intended purpose." CropLife Pet. 18.

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[3] As Petitioners note, the Second Circuit did not rule on the question. CropLife Pet. 6; AFBF Pet. 7.

Indeed, the case did not address the meaning of "waste," and it involved no pesticide *use* at all (as discussed below, *infra* 25, CERCLA explicitly exempts applicators of FIFRA-registered pesticides from liability).

The question of intent arose solely in the context of whether the seller "*arranged* for disposal . . . of hazardous substances," so as to be jointly liable for the third party's spills under 42 U.S.C. § 9607(a)(3) (emphasis added). 129 S.Ct. at 1878. To answer that question, this Court employed precisely the same interpretive method applied by the Sixth Circuit here: because CERCLA does not define "arrange," the Court looked to dictionary definitions, and construed the term in accordance with its ordinary meaning. Noting that "the word 'arrange' implies action directed to a specific purpose," the Court concluded that an entity *arranges* for disposal "when it takes intentional steps to dispose." *Id.* at 1879.

Burlington Northern is not remotely analogous to this case. The meaning of "arrange" under CERCLA has nothing to do with the meaning of "waste" under the CWA. Moreover, the Sixth Circuit did not hold that pesticide *sellers* could be liable as "dischargers of pollutants" under the CWA for pesticides later applied to water by third parties. Rather, it held that pesticide *applicators* must obtain coverage under NPDES permits before they may legally discharge pollutants to or over water.

Petitioners' further contention that the ruling below is "flatly inconsistent" with *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009), CropLife Pet. 20-21, likewise misses the mark. There, the only interpretation of "waste" came under the Resource Conservation and Recovery Act ("RCRA"). Although the term "waste" is not defined in the CWA, "solid waste" is narrowly defined in RCRA to mean "discarded material" that has been "abandoned." 42 U.S.C. § 6903(27); 40 C.F.R. § 261.2(a)(2)(i)(A), (b). Accordingly, the Second Circuit held in *Cordiano* that the operators of a gun club need not obtain a "hazardous waste disposal" permit under RCRA because spent ammunition from their firing range did not meet that narrow definition. 575 F.3d at 206-07.

Despite the differences between the two statutes, Petitioners argue that RCRA's definition of "solid waste" should determine the meaning of "chemical waste" and "biological materials" under the CWA, so as to preclude NPDES coverage for the discharge of "materials put to their ordinary, intended use." CropLife Pet. 20. EPA squarely disagrees. In a 1995 amicus brief, EPA stated that spent rounds and skeet targets from firing ranges *are* "pollutants" under the CWA even though they are *not* "solid waste" under RCRA. *See Long Island Soundkeeper Fund v. New York Athletic Club*, 1996 WL 131863, at *9, *14-*15 (S.D.N.Y. 1996) (adopting EPA's construction). Similarly, in its 2006 preamble to the pesticide exemption, EPA specified that "today's discussion of the terms 'chemical waste' and 'biological materials' *applies only*

for CWA purposes and is *not intended to address the use of those terms or similar terms under any other statutes the Agency administers*." CropLife Pet.App. 42a (emphases added).

II. THE COURT'S *CHEVRON* ANALYSIS WAS CORRECTLY PERFORMED.

To determine whether EPA's regulation exempting pesticide applications "to" and "over" surface waters was consistent with the CWA, the Sixth Circuit employed and properly conducted the familiar *Chevron* analysis. *See, e.g.*, CropLife Pet.App. 10a (citing *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), and *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2534 (2007)); *id.* 14a (citing additional cases).

Appropriately, the court relied primarily on a careful reading of the statutory language. *E.g., City of Chicago v. Environmental Def. Fund*, 511 U.S. 328, 339 (1994) ("It is not unusual for legislation to contain diverse purposes that must be reconciled, and the most reliable guide for that task is the enacted text."). The Sixth Circuit was aided in its textual analysis by the fact that two of the operative terms in the definition of "discharge of a pollutant" – "pollutant" and "point source" – are themselves separately defined in the statute. 33 U.S.C. § 1362(6) & (14). This generous degree of statutory guidance easily distinguishes this case from *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498 (2009), on which

Petitioners rely, CropLife Pet. 22 n.11, 25-26; AFBF Pet. 22, 26 n.15, as *Entergy* addressed a terse provision of the CWA found to be "silent . . . with respect to all potentially relevant factors." 129 S.Ct. at 1508.

Where terms in the statutory definitions were not themselves specifically defined, the Sixth Circuit gave them their "ordinary, contemporary, [and] common meaning," CropLife Pet.App. 15a (quoting *Williams v. Taylor*, 529 U.S. 420, 431-32 (2000)), and then tested that meaning against the structure, purpose, and history of the statute. Finally, the court looked to the longstanding interpretations given to these terms by the principal regulatory agency, EPA.

Petitioners chide the Sixth Circuit for not simply deferring to all of the interpretations offered by EPA in the rule itself, arguing that the court's approach thus "renders agency interpretive rules vulnerable to the subjective interpretations and policy making of judges." AFBF Pet. 27. Petitioners overlook the critical function of the *Chevron* Step One analysis: to guard against wholesale legislating by unelected executive branch employees. So long as a court's analysis is, like the Sixth Circuit's here, faithful to the language drafted by Congress, the court is not itself making policy, but rather is giving effect to the policies of Congress. *E.g.*, *City of Chicago*, 511 U.S. at 339 (setting aside EPA hazardous waste exemption for municipal fly ash because it conflicted with the plain language of RCRA). Such adherence to the plain statutory language is essential to the preservation of

the separation of powers between the legislative and executive branches.

A. The Court Properly Held That Pesticide Applications That Result in Discharge of Chemical Waste Directly to Waters Are Subject to CWA Permitting.

As EPA recognizes, and as Petitioners apparently concede, the airplanes, trucks, and the like used to apply pesticides "to" and "over" water are "point sources" within the meaning of 33 U.S.C. § 1362(14). CropLife Pet.App. 21a. The Sixth Circuit's determination that residual and excess pesticide materials are "chemical wastes" that are "discharged" from these point source pesticide applications follows directly from the language of the CWA, and is consistent with the purpose of the statute, with logic, and with longstanding precedent.

1. Excess and Residual Pesticide Materials Are "Chemical Wastes" Within the Meaning of the CWA.

To determine the ordinary meaning of "waste," the court consulted three authoritative dictionaries and concluded that among the common meanings of the term are "superfluous" and "excess" materials, materials that are "no longer useful," and "worthless byproduct[s]." CropLife Pet.App. 15a-16a. Thus, the court found, while chemical pesticides applied to

water for a beneficial purpose are not themselves waste, "excess pesticide and pesticide residue meet the common definition of waste." *Id.* 16a. This interpretation hardly "stretches logic and English usage past the breaking point." AFBF Pet. 21. Rather, it is precisely the same conclusion reached by EPA, both in the preamble to the rule at issue here, CropLife Pet.App. 41a ("residual [pesticide] materials are . . . pollutants"), and in its longstanding practice of treating pesticide materials in point source storm water discharges as pollutants, *id.* 40a-41a; *see also* 55 Fed. Reg. 47,990, 48,019-20 (Nov. 16, 1990) (JA 309-10).

While Petitioners concede that excess and residual chemicals fall within the common meaning of waste, CropLife Pet. 14 ("the common meaning of 'chemical waste' is 'discarded,' 'superfluous,' or 'excess' chemical"), they argue that pesticide materials cannot be pollutants because pesticide applicators do not treat them as waste, *id.* 18 ("'waste' . . . implies an *intention* to discard"). It is curious that those who counsel agency deference would take this position, as it is diametrically opposed to EPA's own interpretation of the Act. EPA has long rejected the notion that the need for an NPDES permit turns on a discharger's intent. *E.g.*, EPA Sixth Cir. Merits Br. 39 (11/6/07). If intent were the key, EPA and the Corps of Engineers could not regulate fill material as the discharge of a pollutant when it is added to waterways for the (beneficial) purpose of changing their bottom elevations, yet they have long done so, with the

blessing of the federal courts. *E.g., Rapanos,* 547 U.S. at 760.

Moreover, it is hardly noteworthy that pesticides are not specifically mentioned in the "laundry list" of substances included in the Act's definition of "pollutant." AFBF Pet. 30. Machine oil, paint, and industrial solvents also are not listed, yet all clearly can be pollutants, because "chemical waste" *is* specifically listed. *See Pittston Coal Group v. Sebben*, 488 U.S. 105, 115 (1988) (no ambiguity where the statute "plainly embraces criteria of more general application").

2. The Excess and Residual Pesticide Materials Are Added to Waters "From" Point Sources.

The only aspect of EPA's reasoning here that the court found inconsistent with the statute was the agency's illogical position that the excess and residual pesticides placed in waters by point source pesticide applications are not discharged by those point sources. EPA took this position only at the very end of its rulemaking, when it realized that a previously articulated rationale for the pesticide exemption was untenable.[4] *Compare* 70 Fed. Reg. 5,093, 5,099 (Feb.

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[4] In its explanation for the proposed rule, EPA had stated that pesticide residues from lawful pesticide applications are not pollutants. It dropped this rationale after receiving comments noting that this was inconsistent with its own longstanding

(Continued on following page)

1, 2005) (JA 140), *with* CropLife Pet.App. 41a-42a. As the Sixth Circuit noted, EPA's new position was fundamentally inconsistent not only with the language and purpose of the Act, but with what the agency itself had recently characterized as "EPA's longstanding position . . . that an NPDES pollutant is 'added' when it is introduced into a water from the 'outside world' by a point source." CropLife Pet.App. 23a (quoting 73 Fed. Reg. 33,697, 33,701 (June 13, 2008) (final rule defining phrase "addition of any pollutant" in 33 U.S.C. § 1362(12)). Certainly, the excess and residual pesticide is "introduced into the water from the outside world" by the point source applicator.

Petitioners' argument to the contrary – that "[o]ne cannot spray ice 'from' a hose," or "squeeze butter 'from' a cow," AFBF Pet. 22 – misses the point. Those examples rely on a transformative intermediary (a temperature drop and the butter churn, respectively), while pesticides become waste material with no transformation whatsoever. CropLife Pet.App. 21a ("excess and residue pesticides have *exactly the same chemical composition* and are discharged from the *same* point source *at exactly the same time* as the original pesticide") (emphases added). Further, as the Sixth Circuit found, all "excess" or "residual" pesticide deposited to the water from aerial applications to

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interpretation that such residues *are* pollutants when they reach waterways (*e.g.*, in stormwater).

pests *over* water is "necessarily" waste before it enters the water. *Id.* 17a. All of the "excess" pesticide from applications *to* the water – the portion that does not reach the target – is also waste at the point of discharge.[5] *See also id.* ("both non-waste aqueous pesticide and pesticide residual are applied to the water at the same moment").

Indeed, even if one were to assume that none of the pesticide became waste until *after* discharge to the water, there would be nothing remarkable about the conclusion that the discharge to the water of something that inexorably *becomes* a pollutant shortly after discharge is the discharge of that pollutant.[6] EPA itself has long held this position. *See supra* p. 11 (skeet targets used at firing range).

Petitioners' further suggestion that the statute is ambiguous because it uses the simple term "from," AFBF Pet. 22-23, is preposterous. Indeed, as Petitioners later acknowledge, "[t]he words and their natural reading are fairly simple." *Id.* 25. The ordinary meaning of "from" is "a function word to indicate

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[5] Petitioners tend to emphasize pesticide "residue," while downplaying the court's finding that "excess" pesticide is also waste, in an attempt to obscure this fact. AFBF Pet. 10, 20-23; CropLife Pet 9, 10.

[6] *E.g.*, *NRDC v. Southwest Marine, Inc.*, 236 F.3d 985, 990 (9th Cir. 2000) (aerial discharge of cleaning and paint products during use at marina); *Hudson River Fishermen's Ass'n v. City of New York*, 751 F. Supp. 1088, 1101-02 (S.D.N.Y. 1990) (chlorine and alum injected to waterway as purification agents), *aff'd*, 940 F.2d 649 (2d Cir. 1991).

a starting point of a physical movement." Merriam-Webster Online Dictionary, first definition (emphasis added), *available at* http://www.merriam-webster.com/dictionary/from. If the excess and residual pesticide does not come "from" the point source, from where *does* it come? In Petitioners' view, apparently, it arises spontaneously.[7]

As the Sixth Circuit observed, its holding on this point is also fully consistent with legislative history indicating the Act's intent that water pollution be controlled through "point source" regulation when feasible, and with the Act's central purpose of protecting surface waters through the NPDES permitting program. CropLife Pet.App. 14a-15a, 22a-23a (citing S.Rep. No. 92-414, at 76-78 (1971)), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3742-44.

3. Petitioners' Professed Concerns About the Reach of This Holding Are, at Best, Substantially Overblown.

Imagining catastrophe, Petitioners argue that the Sixth Circuit's opinion will sweep into the Act's permitting program a variety of activities Congress

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[7] Petitioners offer the following analysis: "'Pollutants *from* a point source,' in common parlance, means pollutants *coming out of* a point source – not pollutants *caused by* a point source." AFBF Pet. 25. Even if there is a meaningful difference between these two phrasings, there can be no question that excess and residual pesticide "comes out of" the point source pesticide application.

did not intend to regulate. These arguments either misread the court's opinion or ignore other portions of the statute. At best, they suggest that this case warrants review because other courts may mistakenly extend the Sixth Circuit's analysis beyond the opinion's holding. This is not the standard for *certiorari*.

For example, Petitioners argue that the court "created its own 'but for' test" and thereby "found that the 'plain language' of the CWA *mandates* a holding that there is a 'discharge of a pollutant' subject to NPDES permitting *whenever* a pesticide residue makes its way to navigable waters." CropLife Pet. 10 (second emphasis added). This is patently untrue. The Sixth Circuit's application of a "but for" analysis to pesticides discharged *directly into or over* surface waters was simply a means of demonstrating that excess and residual pesticide materials are "added" to the surface waters from these point source applications, and the court's opinion (like the EPA rule it addresses) is limited to that set of facts. The opinion does not purport to transform the eventual runoff to surface waters from pesticides applied *on the land* into point source discharges.

Nonetheless, Petitioners suggest that the Sixth Circuit's reasoning *could* be extended that far, requiring, for example, NPDES permitting for "farmers who use pesticides to save crops." AFBF Pet. 13. But the Act itself explicitly *exempts* "agricultural stormwater discharges and return flows from irrigated agriculture" from the definition of "point source" – and thus from NPDES permitting requirements –

even when it reaches the water through a discrete conveyance that would otherwise be classified as a point source. 33 U.S.C. § 1362(14). Where non-agricultural additions of pesticide residues to water come from diffuse "nonpoint sources" (such as sheet runoff from golf courses or residential areas), they will continue to be outside of the Act's permitting program as well. *See generally Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) (NPDES program does not regulate "unchanneled and uncollected surface waters"). No NPDES permit is required for diffuse pesticide runoff because the pesticide residues do not *enter the water* directly "from" the point source pesticide application.

Petitioners also express concern that airborne pesticide "drift" to surface waters from aerial spraying on land may be subject to NPDES permitting, another topic not addressed by the opinion below. CropLife Pet. 29-30; AFBF Pet. 16-17. When it issued the pesticide exemption, EPA specifically declined to extend the exemption to such situations, noting that it is "continuing to consider the applicability of the CWA to . . . [the] drift of pesticides applied aerially over land."[6] CropLife Pet.App. 43a-44a. Review of the Sixth Circuit's opinion to address this inchoate, ancillary issue is not warranted.

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[6] One focus of the multi-stakeholder advisory committee EPA has established to study the issue is "minimizing both the occurrence and potential adverse effects of pesticide spray drift." *Id.* 44a.

B. The Sixth Circuit Properly Held That Biological Pesticides Are Biological Materials.

No one disputes that biological pesticides *are*, in fact, biological materials. EPA describes them as "microorganisms, including bacteria, fungi, viruses, and protozoa," and as being "derived from plants, fungi, bacteria, or other non-man-made synthesis."[9] Under *Chevron*, this ends the analysis. The statutory language is clear, and the substances in question plainly come within that language.

Petitioners endeavor to inject "ambiguity" into the plain statutory language with two arguments. The first is that Congress could not possibly have meant what it said. As the Sixth Circuit noted, however, "Congress purposefully included the term 'biological materials,' rather than a more limited term such as 'biological wastes.'"[10] CropLife Pet.App. 19a. Although Petitioners seek support for a contrary reading from *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976), *see* CropLife Pet.

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[9] EPA, *Pesticides: Glossary*, *available at* http://www.epa.gov/pesticides/glossary; *see also* 64 Fed. Reg 46,012, 46,017 (Aug. 23, 1999).

[10] This was not a result of careless drafting: Congress *did* append the term "waste" to five of the other enumerated "pollutants" in 33 U S C. § 1362(6). Moreover, that list includes six other items that also are not necessarily "wastes." *Id.* ("munitions," "radioactive materials," "heat," "rock," "sand," and "cellar dirt").

22 n.11; AFBF Pet. 35-36, that case illustrates the kind of exceptional circumstances that must be present before the courts may disregard the plain text of a statute. There, this Court found clear and unequivocal evidence in the legislative history of the CWA that Congress did not intend the Act to regulate the nuclear byproduct materials covered by the Atomic Energy Act. Thus, the Court held that the unqualified inclusion of "radioactive materials" in the Act's definition of pollutant had been, in effect, a scrivener's error. 426 U.S. at 11-24. As discussed below, there is nothing in the legislative history stating that Congress did not intend the Act to cover pesticides.

Petitioners' second argument is that a plain reading of the statute could lead to absurd results, "such as NPDES permitting for a worm at the end of a fisherman's line." CropLife Pet. 22 n.11. This is not a serious possibility. Several circuit courts have found an implied exemption in the Act for *de minimis* situations of that nature,[11] and this Court has reversed a contrary decision on that very issue, *Arkansas v. Oklahoma*, 503 U.S. 91, 96, 110-12 (1992).

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[11] *E.g.*, *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 483, 491 (6th Cir. 2008) (citing cases); *cf. United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 647 (2d Cir. 1993) (passerby flinging candy wrapper into river or swimmer urinating is not violating the Act). EPA recognizes this principle as well. *E.g.*, 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993) (no "dredge and fill" permit required under 33 U.S.C. § 1344 for *de minimis* additions to waters).

The potential harm from biological pesticides, on the other hand, cannot reasonably be characterized as *de minimis*. Biological pesticides are designed to cause harm to certain species, and can harm others as well. Thus, while the Ninth Circuit has applied the *de minimis* principle in holding that native mussels taken from one part of Puget Sound and deposited to another are not "pollutants" under the Act, *Association to Protect Hammersley, Eld, & Totten Inlets ("APHETI") v. Taylor Res., Inc.*, 299 F.3d 1007, 1017 (9th Cir. 2002), it has also held that biological insecticides "meet the definition of 'pollutant' under the [CWA]," *Forsgren*, 309 F.3d at 1185, noting that "[t]he record reveals a number of harmful side effects" to their use, *id.* at 1183.[12]

Moreover, the Sixth Circuit was careful to note that it was not endeavoring to "define[] the outermost bounds of 'biological materials'" within the meaning of the Act's definition of pollutant. CropLife Pet.App. 19a. Rather, the court simply held that, whatever those limits might reasonably be, biological pesticides come within them.

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[12] The common feature among the items listed as "pollutants" is that *all may impair water quality*, a feature that biological pesticides share. *See Northern Plains Res. Council v. Fidelity Expl. & Dev. Co.*, 325 F.3d 1155, 1162-63 (9th Cir. 2003) (clarifying that the *APHETI* holding turned on whether there was "degradation of the quality of receiving waters")

C. The CWA Does Not Exempt Pesticides From Its Purview.

Alternatively, Petitioners argue that the Sixth Circuit should have ruled that the CWA *impliedly* exempts pesticide materials from NPDES permitting requirements. Such a ruling would have been particularly unwarranted, given that Congress has already included an *express* NPDES exemption for some agricultural pesticide discharges, 33 U.S.C. §§ 1362(14), 1342(l)(i), but not for pesticide use generally. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (applying maxim of *expressio unius est exclusio alterius* to reject implied exemption under similar circumstances). Congress has plainly demonstrated elsewhere that it knows how to exempt pesticide use when it wants to. *E.g.*, 42 U.S.C. § 9607(i) (exempting applicators of FIFRA-registered pesticides from CERCLA liability); *cf. City of Chicago*, 511 U.S. at 338 ("Congress knew how to draft a waste stream exemption in RCRA when it wanted to.").

None of Petitioners' arguments on implied exemption has merit. That the legislative history of the 1972 Act does not discuss the permitting of pesticide discharges, AFBF Pet. 30, is unavailing. *See Moskal v. United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history."). Moreover, there is nothing in the legislative history to indicate that Congress intended to exempt pesticide use from the Act's provisions but forgot to do so. Petitioners cite statements from

Senator Dole, AFBF Pet. 29-30 n.16; CropLife Pet. 23 n.12, regarding the general benefit of pesticides – which are similar to statements made by other members of Congress about the benefit of industry generally – but they fail to mention Senator Dole's pointed observation that some pesticides "retain their potency for virtually unlimited periods after application, their residues are introduced into the complicated food chains at work in nature, and, ultimately, they become concentrated at levels which are hazardous to both animal and human life." S.Rep. No. 92-414, at 99.

That Congress chose in 1977 to exempt *some* pesticide discharges by adding an exemption for certain agricultural flows, CropLife Pet. 26, simply makes the point that they were not exempted previously. There would have been no *need* for this limited exemption if, as Petitioners argue, all pesticide discharges had *already* been exempted in the 1972 Act.[13]

Moreover, there was no "contemporaneous interpretation" by EPA that pesticide discharges were exempt. AFBF Pet. 33-34; CropLife Pet. 25-26. EPA made various statements from 1977 through 1996

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[13] The pertinent legislative history indicates that Congress specifically meant for the 1977 exemption to extend to "pesticides" as one of the harmful constituents of agricultural runoff (based on the usually "diffuse" nature of those discharges). S.Rep. No. 95-370, at 37 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4326, 4353.

indicating that pesticides may be "discharged" to water only "in accordance with an NPDES permit," CropLife Pet.App. 5a, stated in a 1999 amicus brief that "EPA approves pesticides under FIFRA with the knowledge that pesticides containing pollutants may be discharged from point sources into the navigable waters only pursuant to a properly issued CWA permit," Res.App. 14,[14] and published policy guidance documents in 2001 and 2002 characterizing the application of aquatic pesticides as a "low *enforcement* priority," JA 91 (emphasis added). At most, at the time EPA published its final rule in 2006, the agency had a 30-year track record of *not enforcing* the CWA against unpermitted pesticide applications made to water – "a sort of 30-year adverse possession" marked by the agency's "disregard of statutory text." *Rapanos*, 547 U.S. at 752. Because this practice was not formally announced – and because EPA's public statements suggested that permitting *was* occurring – Congress would have had no reason to know about it. *See Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).

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[14] EPA's brief in *Headwaters*, *see supra* p. 8, stated that the Act was *unambiguous* on this point. Alternatively, EPA sought deference for its position under Chevron Step Two based on its "consistent" historical interpretation. *Id.* 18-21. Agency amicus briefs are not mere "litigation positions." Especially where, as here, the agency offers a broad policy position of its own accord, "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

Nor is section 104(l) of the Act supportive of an implied pesticide exemption. That provision – which *no party* thought important enough to cite to the Sixth Circuit, but which Petitioners now offer as a central point in their argument – directs EPA to study (1) the fate and effect of pesticides in waterways, (2) "methods to control" pesticide releases, and (3) "alternatives" to pesticides. 33 U.S.C. § 1254(l). This provision, if anything, suggests that Congress believed that pesticides *are* within the purview of the CWA. It is certainly not inconsistent with NPDES permitting for pesticide pollutants, and evinces no intent to override later sections of the Act that actually *address* the question of when an NPDES permit is required.[15] Indeed, other subsections of section 104 direct EPA to also study *other* substances that are undisputedly regulated under the NPDES program. *Id.* § 1254(m) (waste oil), § 1254(o) (sewage).

Petitioners' further suggestion that FIFRA should be read to imply an intent to exclude pesticides from the CWA is flatly inconsistent with the language of the statutes and the decisions of this Court. Petitioners point to no language in the text or history of either statute to indicate a clear intent that the CWA stand down in favor of FIFRA, and it is a bedrock principle of statutory construction that "where two statutes are capable of coexistence, it is the duty of

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[15] The same is true of section 208, 33 U.S.C. § 1288, a provision of general application on which Petitioners now purport to rely.

the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (internal quotes omitted) (reading FIFRA narrowly to avoid conflict with the Tucker Act). In the field of federal environmental law, overlapping protection by multiple statutes is the norm, not the exception, *e.g.*, Res.App. 10-11, 16-20 (citing examples); *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 53 (D.C. Cir. 1987), and this Court has already held that FIFRA is not the final regulatory word on pesticide use, *Mortier*, 501 U.S. at 613-14. As EPA has noted, the CWA and FIFRA serve different purposes, use different risk management approaches, and employ different – but not inconsistent – control strategies. Res.App. 10-21; *see also Headwaters*, 243 F.3d at 531-32; *cf. Erlenbaugh v. United States*, 409 U.S. 239, 244-48 (1972) (refusing to apply the canon of *in pari materia* "to introduce an exception to the coverage of [a broad, remedial statute] where none is now apparent").

Finally, Petitioners' claim that "the overall statutory scheme" supports its interpretation because the NPDES "is not a program to regulate beneficial activities that also can have adverse environmental effects, but a program to eliminate pollutant discharges seen as serving no societal good," AFBF Pet. 31, is demonstrably untrue. Pest control activities are no different in this respect from steel mills or military installations, both of which provide an obvious social good, yet are nonetheless regulated by the NPDES program to control their adverse effects.

III. THE PRACTICAL EFFECT OF THE SIXTH CIRCUIT OPINION WILL NOT BE UNDULY DISRUPTIVE, AND WILL BENEFIT THE ENVIRONMENT AND PUBLIC HEALTH.

A. Petitioners Vastly Overstate the Disruption That May Be Occasioned by NPDES Permitting for Aquatic Pesticides.

Relying largely on a quote taken out of context from EPA's brief in support of the stay of the mandate, Petitioners argue that there will be "significant disruption" to pesticide use. CropLife Pet. 2-3, 12; AFBF Pet. 12. But EPA did not, as petitioners suggest, state that subjecting pesticide discharges to NPDES permitting would be inherently disruptive. Rather, EPA stated that the decision would be disruptive *unless stayed*, but that granting the two-year stay would eliminate the disruption by "allow[ing] EPA and authorized permitting authorities sufficient time to develop and issue [CWA] permits containing appropriate terms to govern the discharge of pesticide pollutants to waters of the United States." CropLife Pet.App. 108a-109a. Until the permits are issued, pesticide applicators are allowed to continue practices as usual without threat of CWA enforcement.

Any future disruption to food production or disease control is purely speculative. The vast majority of the nation's agricultural activities were unaffected by the rule in the first place and will remain

unaffected by the decision below, both because the Act exempts agricultural stormwater and irrigation return flows from NPDES regulation and because most agricultural pesticide use does not involve discharges "to" or "over" waters.

Nor have Petitioners offered any concrete examples of increased threats to public health resulting from NPDES permitting. Recent history shows this fear to be unfounded. Four states – California, Oregon, Washington, and Nevada – issued general NPDES permits covering many pesticide applications to waters after the 2001 *Headwaters* decision. CropLife Pet.App. 31a. And, as EPA has noted, "twenty-three states have developed permits to cover some types of pesticide discharges." *Id.* 149a. In none of these situations were pest control efforts substantially impeded, or a public health threat caused, by the imposition of a permitting requirement.

Petitioners premise the bulk of their arguments on the false assumption that they face a stark binary choice between ceasing their activities and violating the CWA. Yet there are many ways to avoid discharging pesticides into waters – such as the use of buffer zones around waterways, or using means of control other than pesticides – that would obviate the need for CWA permitting altogether. Should these options not be available, obtaining and complying with NPDES permits would render necessary discharges legal.

Under the Sixth Circuit's stay, EPA is moving forward with the development of a "model" general permit, which it expects to serve as a template to ease administrative burden on state and tribal permitting agencies, as well as on pesticide applicators. CropLife Pet.App. 115a-116a, 118a-119a; *see generally Miccosukee Tribe*, 541 U.S. at 108 n.* (noting efficiency of general permit approach). The use of general permits is not merely a "theoretical possibility." AFBF Pet. 19 n.12. EPA is proceeding under this approach precisely because it believes that most aquatic pesticide applications will, in fact, be covered under that general permit (or a state equivalent). In those instances where pesticide use is "safe" (as Petitioners maintain is often the case), permitting should be relatively easy.

B. The Permitting of Aquatic Pesticides Does Not Constitute "the Greatest Expansion" of the NPDES Program.

Petitioners' contention that the decision below constitutes the "greatest" or "most dramatic" regulatory expansion in CWA history, AFBF Pet. 13; CropLife Pet. 29, is pure fantasy. In fact, several times prior to the Sixth Circuit's ruling (most recently two years ago), federal appellate courts struck down illegal attempts by EPA to exempt point source

discharges from the NPDES program.[16] Each of these was at least as "dramatic" as this one. Moreover, Petitioners greatly understate the scope and complexity of the *existing* NPDES permitting program. At present, that program includes 57 effluent limitation guideline categories, with roughly 450 subcategories, *see* 40 C.F.R. Subchapter N (Parts 405-471); aquatic pesticides will be just one more category, with eight proposed subcategories. Permits in most of these other categories are far more complex than will be required for routine pesticide applications.[17]

Furthermore, an examination of EPA's estimate of the potential universe of aquatic pesticide permitting demonstrates both that the agency's projections are likely to be exaggerated and that the overwhelming majority of permitted applications will

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[16] *E.g.*, *Costle*, 568 F.2d at 1372-73 (certain silviculture, agricultural, and stormwater discharges); *Northwest Envtl. Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008) (ballast water from ships).

[17] EPA estimates that over 115,000 facilities are presently covered by NPDES permits, of which over 45,000 have individual permits, and 6,700 of which are "major" facilities (*e.g.*, oil refineries, chemical manufacturing facilities, power plants). EPA, *Facilities and Enforcement Activities Related to the [CWA's NPDES] Program*, *available at* http://www.epa.gov/oecaerth/data/results/performance/cwa/index.html#1. A single "major" facility often has numerous outfalls discharging dozens, if not hundreds, of different pollutants on a near-continuous basis. Aquatic pesticide applications, by contrast, tend to involve the infrequent discharge of one or a few pollutants from a single discharge point.

have nothing to do with insect-borne disease. EPA acknowledges that its projections (done to support the April 2009 stay motion) were assembled quickly, and without peer review, from secondary sources and through the use of generalizing assumptions. Res.App. 22. Almost all of the estimated annual applications are for weed and aquatic vegetation control, and the estimated numbers for these applications are based on expansive assumptions.[18] Applications for mosquito control represent *less than one percent* of the assumed total. *See id.* 23.

C. NPDES Permitting Will Have Substantial Real-World Benefits, Consistent with the Act's Protective Goals.

Although Petitioners strive to characterize it as regulation for regulation's sake, EPA believes that requiring NPDES permits for aquatic pesticide applicators has significant, demonstrable benefits for human and ecological health. *See* Res.App. 12-14 (citing protections afforded by CWA, but not by FIFRA).[19] Unlike the CWA, FIFRA imposes no

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[18] Over 90% of of the total number of estimated applicators are for *assumed* applications to irrigation "ditchbanks," with no indication of how many of these potential applicators *actually* apply (or need to apply) pesticides or whether application to the banks of these ditches would *actually* reach navigable waters.

[19] The agency recently reiterated that "[p]ermit requirements go[ing] beyond the FIFRA label" will yield "environmental benefits." EPA, *CWA Permitting of Discharges from Pesticide*

(Continued on following page)

requirements for site specific analysis of the presence of endangered species, or of whether certain waterways need special protections because of extraordinarily pure conditions (*e.g.*, in wilderness areas) or because they are already polluted at levels toxic to fish and wildlife.[20] Thus, the State of California, in its comments opposing EPA's rule, noted that 27% of its waters were impaired by pesticides and that permitting gave it an important tool to address point source discharges of pesticides. JA 142-43.

Implementation of EPA's permitting program should lead both to the development of newer aquatic pesticides that do their work without leaving residues and to increased reliance on less toxic means of pest control. This is wholly consonant with the Act's "technology-forcing" focus. *NRDC v. EPA*, 859 F.2d 156, 208-09 (D.C. Cir. 1988). Indeed, in the 1971 CWA Senate Report, Senator Dole emphasized the importance of "develop[ing] *alternative means* of pest, weed and fungal control," reducing "[o]ff-target applications," and developing "pesticides which *degrade after*

Applications (Oct. 14, 2009), at 5, *available at* http://www.epa.gov/pesticides/ppdc/2009/october/session-1a.pdf.

[20] In one nationwide study, "[m]ore than one-half of agricultural and urban streams sampled had concentrations of at least one pesticide that exceeded a guideline for the protection of aquatic life," despite regulation by FIFRA, with most samples containing multiple pesticides. U.S. Geological Survey, *The Quality of Our Nation's Waters, Nutrients and Pesticides* (USGS Circular 1225, 1999), at 6, *available at* http://pubs.usgs.gov/circ/circ1225/pdf.

application and *leave no toxic or hazardous after-products*." S.Rep. No. 92-414, at 99 (emphases added).

Two cases illustrate how NPDES permitting can spur the effective use of non-pesticide alternatives. After the Ninth Circuit's 2001 *Headwaters* decision, the Talent Irrigation District switched from a chemical herbicide to mechanical means for controlling aquatic vegetation, thus avoiding the need for an NPDES permit while simultaneously producing improvement in the environmental quality of the waterway. *See* Graham Decl. Supp. Pet'r Opp'n EPA Mot. Stay Mandate ¶¶ 4-8 (5/8/09).[21] And, after a challenge to its unpermitted aquatic pesticide use, Idaho's Gem County Mosquito Abatement District eliminated the direct discharge of chemical pesticides to water, implemented programs to reduce mosquito habitat, and significantly reduced pesticide use overall. *See* Dill Decl. Supp. Pet'r Opp'n EPA Mot. Stay Mandate ¶¶ 6-7 (5/8/09). This approach has proven successful in controlling pests and insect-borne disease: Gem County has experienced a *decrease* in the incidence of West Nile virus. *Id.* ¶ 7.

Petitioners offer no reason why public and environmental health will not be best served by mandating compliance with the provisions of both

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[21] *Headwaters* also illustrates the serious potential harm from aquatic pesticide use. one application of chemical herbicide to control aquatic weeds killed over 92,000 juvenile steelhead along a five mile stretch in Bear Creek, a tributary to the famous Rogue River fishery in Oregon. *See* 243 F 3d at 528.

FIFRA and the CWA. There is nothing unsound about the proposition that the use of potentially toxic pesticides should be conducted as safely as possible. The only major potential disruption here appears to be to the pesticide manufacturers' sales, which places these entities in no different position from the myriad other commercial enterprises regulated under the Act.

CONCLUSION

The petitions for *certiorari* should be denied.

Respectfully submitted,

CHARLES M. TEBBUTT
Counsel of Record
LAW OFFICES OF
CHARLES M. TEBBUTT
470 West Broadway
Eugene, OR 97401
541-344-8312

Of Counsel
CHARLES C. CALDART
NATIONAL ENVIRONMENTAL
LAW CENTER
1402 Third Avenue,
Suite 715
Seattle, WA 98101
206-568-2853

DANIEL E. ESTRIN
PACE ENVTL. LITIGATION CLINIC
PACE LAW SCHOOL
78 North Broadway
White Plains, NY 10603

REED W. SUPER
SUPER LAW GROUP LLC
156 William Street,
Suite 800
New York, NY 10038

JANUARY 11, 2010

APPENDIX A

No. 99-35373

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HEADWATERS, INC., et al.,
Plaintiffs-Appellants,

v.

TALENT IRRIGATION DISTRICT,
Defendant-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

QUESTION PRESENTED

Whether compliance with a pesticide label approved under the Federal Insecticide, Fungicide, and Rodenticide Act satisfies the otherwise-applicable requirements of the Clean Water Act governing the discharge of a pollutant into the waters of the United States.

INTRODUCTION

Pursuant to Fed. R. App. Pro. 29(a), the United States submits this brief amicus curiae on behalf of

the Environmental Protection Agency (EPA), the federal agency that administers both the Clean Water Act (CWA), 33 U.S.C. 1251 et seq., and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 et seq. In this case, the district court mistakenly concluded that the absence of instructions on a pesticide label approved by EPA under FIFRA directing the user to obtain a CWA permit eliminates the need for a permit under the CWA. The United States submits this brief to explain the distinct nature of the CWA and FIFRA programs administered by EPA, and to explain that compliance with one statute does not mean compliance with the other.

The CWA and FIFRA create two separate regulatory regimes which address distinct environmental problems. The CWA is designed to restore and maintain water quality by requiring pollutant dischargers to obtain permits for point source discharges into interstate water systems. 33 U.S.C. 1251, 1342. FIFRA, by contrast, is designed to protect against the environmental and health harms caused by pesticides by establishing nationally uniform pesticide labeling and nationally uniform pesticide use regulation. 7 U.S.C. 136a. Neither statute contains any provision suggesting that EPA will make CWA permitting decisions in the course of approving pesticide product labels under FIFRA. Indeed, such an approach would be infeasible. Congress envisioned that FIFRA would promote nationally uniform pesticide regulation and labeling, while Congress envisioned that the CWA's permitting process would allow individualized

determinations of appropriate pollutant discharge levels for individual bodies of water. EPA cannot make blanket determinations through its label approval process of whether, or under what conditions, it is safe to discharge a particular pesticide into a particular water body. Instead, the CWA's permit process is designed to provide a forum for those types of fact-specific determinations.

Approval of a pesticide under FIFRA thus does not speak to the question of whether a permit is required under the CWA to discharge the pesticide into the waters of the United States. Indeed, EPA has construed the two statutes as requiring distinct analyses and has issued a public notice that compliance with the instructions on a FIFRA-approved label does not obviate the need for a permit unde [sic] the CWA. That reasonable interpretation is entitled to deference. As a result, the district court's decision must be reversed.

BACKGROUND

1. Statutory background.

a. The Clean Water Act. The CWA establishes a national objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To achieve that goal, CWA section 301(a), 33 U.S.C. 1311(a), imposes

a prohibition on the discharge of all pollutants[1] from point sources[2] into the navigable waters,[3] except in compliance with the permitting programs established under the Act.

Among the CWA programs that establish an exception to the general prohibition on the discharge of all pollutants, CWA section 402 establishes a permit program administered by the EPA and by approved states under the National Pollution Discharge Elimination System (NPDES). 33 U.S.C. 1342. Under the NPDES program, EPA and approved state

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[1] The CWA defines "pollutant" as:

> dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. 1362(6). EPA has listed acrolein, found in Magnacide H, as a hazardous substance, 40 C F.R 116.4 Table 116.4A, and as an organic toxic pollutant. 40 C.F.R. Part 122 App. D, Table II.

[2] The CWA defines a "point source" as

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. 1362(14)

[3] The CWA defines "navigable waters" as all waters of the United States, including the territorial seas. 33 U.S.C. 1362(7). See also 40 C.F.R. 122.2.

environmental agencies may issue NPDES permits for the discharge of pollutants "upon condition that such discharge will meet either (A) all applicable requirements [under the CWA], or (B) * * * such conditions as the Administrator determines are necessary to carry out the provisions of this chapter." 33 U.S.C. 1342(a).

Under the NPDES program, EPA may impose national "effluent limitations," 33 U.S.C. 1311, on the "quantities, rates, and concentrations" of identified pollutants from particular point source categories, 33 U.S.C. 1362(11). In the absence of such uniform limitations, "the Agency is authorized under CWA § 402(a)(1), 33 U.S.C. 1342(a)(1), to develop such limitations in an NPDES permit on a case-by-case basis." *American Mining Congress v. USEPA,* 965 F.2d 759, 762 n.3 (9th Cir. 1992). Even when a national effluent limitation has been promulgated, such guidelines can "be modified to take account of special characteristics of subcategories of point sources." *NRDC v. Costle,* 568 F.2d 1369, 1378 (D.C. Cir. 1977). Accordingly, the decision whether to issue an NPDES permit, the rates and quantities of pollutant discharges allowed under the permit, and the conditions under which such discharges will be allowed, ordinarily take into account the specific environmental conditions affected by a project involving pollutant discharges.

CWA section 309, 33 U.S.C. 1319, establishes state and federal enforcement mechanisms for the violation of section 301's prohibition on the discharge

of pollutants without a permit. CWA section 355, 33 U.S.C. 1365, authorizes citizen suit enforcement by affected individuals.

b. The Federal Insecticide Fungicide and Rodenticide Act. First enacted in 1947, FIFRA establishes a federal program for the regulation of pesticides. As amended, FIFRA requires that pesticide manufacturers must register their products with EPA. 7 U.S.C. 136a(a). In applying for pesticide registration, manufacturers submit data on the effects of the pesticides on public health and the environment and must also submit a draft product label. 7 U.S.C. 136a(c).

Under FIFRA, EPA may register a pesticide only if it determines that:

> (A) its composition is such as to warrant the proposed claims for it;
>
> (B) its labeling and other material required to be submitted comply with the requirements of this subchapter;
>
> (C) it will perform its intended function without unreasonable adverse effects on the environment; and
>
> (D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. 136a(c)(5). To determine whether a pesticide causes "unreasonable adverse effects on the environment," EPA conducts a cost-benefit analysis, examining

"the economic, social, and environmental costs and benefits of the use" of the pesticide. 7 U.S.C. 136(bb).

FIFRA mandates nationally uniform pesticide labels for a product. 7 U.S.C. 136v. Pesticide labels must not be false or misleading, 7 U.S.C. 136a(c)(9), must contain certain cautionary statements mandated by regulations, and must provide comprehensible directions for use. See 40 C.F.R. Part 156.

2. Factual background. The following facts were found by the district court. The Talent Irrigation District (TID) is an Oregon municipal corporation which operates a system of irrigation canals. Slip Op. 2. The canals take water from Bear Creek and other surface waters of Oregon, and discharge back into those waters. *Id.* at 3. To kill weeds and algae that grow in the canals, TID applies a pesticide, Magnacide H, directly into the canals. *Id.* at 2. TID's use of the pesticide, which includes the toxic chemical acrolein, has allegedly been linked with massive fishkills, including a 1996 incident in which over 92,000 juvenile steelhead salmon were found dead. *Id.* at 3. TID has not obtained a permit under the CWA's NPDES program, 33 U.S.C. 1342, for the discharge of pollutants into the waters of the United States.

Headwaters, Inc., along with Oregon Natural Resources Council Action, (hereinafter "Headwaters"), brought a citizens suit action under 33 U.S.C. 1365. Headwaters alleges that TID violates the CWA by discharging the pollutant acrolein without an NPDES permit.

3. Procedural background. On February 1, 1999, the United States District Court for the district of Oregon (Aiken, J.), granted TID's motion for summary judgment. The court found that Headwaters established all elements of a CWA violation. Thus, the court found that TID is a "person" under the CWA, Slip Op. at 5, that TID's canals constitute "navigable waters" under the Act, *id.* at 7-11, that Magnacide H contains the "pollutant" acrolein, *id.* at 11-12, and that TID had discharged acrolein from a "point source," *id.* at 5.

The court granted summary judgment in favor of TID, however, because it found that the unpermitted discharge of acrolein into the navigable waters was "otherwise authorized by law." *Id.* at 12-19. Specifically, the court found that TID had followed the instructions on the Magnacide H label, which was approved by EPA under FIFRA. That label did not include an instruction that TID obtain an NPDES permit. As the court stated, the discharge of acrolein in aquatic herbicides "is adequately regulated and controlled by FIFRA and the EPA thus making further regulation by [the Clean Water] Act unnecessary." *Id.* at 12. The court found that "to give effect to both FIFRA and the Act" it "must construe the EPA-approved label on Magnacide H as an indication that an applicator of Magnacide H does not need a NPDES permit." *Ibid.* In support of that conclusion, the court pointed to the EPA-approved pesticide label of another aquatic pesticide, which included the statement that an NPDES permit may be required to discharge

the pesticide into public waters. *Id.* at 13. Because the label for Magnacide H includes no such statement, the court reasoned, EPA must have concluded that no NPDES permit is required in order to discharge the pesticide. Finding that TID followed the label instructions, the court granted it summary judgment.

SUMMARY OF ARGUMENT

The district court erred in concluding that compliance with the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) obviates the need for a permit under the Clean Water Act (CWA). Nothing in either statute supports that conclusion. FIFRA and the CWA establish separate statutory programs, serve distinct purposes, and call for very different environmental analyses. FIFRA establishes nationally uniform pesticide regulation and labeling, requiring EPA to weigh the economic benefits of registering a pesticide against the environmental harms associated with the pesticide's use. The CWA, in contrast, ordinarily calls for a case-by-case analysis of the environmental effects of particular discharges of a pollutant into a particular water body. Except where it is mandated by statute, EPA's approval of a pesticide label under FIFRA does not involve analysis of whether, or under what conditions, the use of the pesticide would be consistent with other statutes EPA administers.

The two statutes are easily compatible: a person seeking to discharge a pollutant into a public water body from a point source may comply with both FIFRA and the CWA by following the directions on a pesticide label approved under FIFRA *and* by obtaining a permit when required by the CWA. The district court erred in concluding that compliance with a pesticide label alone satisfies both statutes.

ARGUMENT

COMPLIANCE WITH FIFRA DOES NOT ELIMINATE THE NEED TO OBTAIN AN NPDES PERMIT UNDER THE CWA

As the Supreme Court has stated, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Where two statutes overlap, "the proper approach * * * is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

There is no conflict between the CWA and FIFRA. Notwithstanding the district court's suggestion to the contrary, it is not unusual that a subject like pesticide use is addressed by two different statutory programs. As the D.C. Circuit has stated, "the provision of multiple regulatory authorities is far from unknown." *Environmental Defense Fund v. EPA*,

598 F.2d 62, 77-78 (D.C. Cir. 1978). The two statutes are easily "capable of co-existence": a person who seeks to discharge a pesticide into the waters of the United States from a point source must comply with *both* statutes by following the instructions on the pesticide label *and* by obtaining an NPDES permit when required by the CWA. The district court erred in concluding that compliance with the approved instructions on a pesticide label satisfies both statutes.

A. Two Distinct Analyses Are Required to Determine Compliance with FIFRA and Compliance with the CWA

Nothing in FIFRA or the CWA remotely suggests that compliance with FIFRA also means compliance with the CWA. Indeed, the CWA and FIFRA address different concerns and establish different regulatory programs, necessitating distinct analysis under each statute. The CWA seeks "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To accomplish that goal, the CWA establishes a permitting process – the NPDES process, 33 U.S.C. 1342 – under which a permit is required in order to discharge pollutants from a point source into the navigable waters. FIFRA, by contrast, seeks to ensure uniform pesticide labeling and to protect human health and the environment from the harms caused by pesticides. To establish that goal, FIFRA requires pesticide manufacturers to register their products with EPA and requires

pesticide users to comply with the instructions on a pesticide label. 7 U.S.C. 136a, 136j(a)(2)(G).

The two statutes require different environmental analyses [sic] FIFRA requires evaluation of whether a pesticide may cause "unreasonable adverse effects on the environment." 7 U.S.C. 136a(c)(5). EPA may register a pesticide under FIFRA only if the economic and social benefits brought by a pesticide outweigh the environmental harms caused by pesticide use. 7 U.S.C. 136(bb). Under the CWA, EPA may permit the discharge of a pollutant only if it will satisfy the effluent limitations imposed on the basis of available technology and any other conditions imposed by EPA to protect water quality. 33 U.S.C. 1342(a). Pollutant discharges may not satisfy the CWA standards even though they involve the discharge of pesticides registered under FIFRA.

Moreover, the two statutes differ fundamentally because FIFRA establishes nationally uniform pesticide labeling and nationally uniform pesticide regulation, 7 U.S.C. 136v, while the NPDES program permits particular discharges into particular water bodies, which ordinarily must be determined on a case-by-case basis. *American Mining Congress v. USEPA*, 965 F.2d 759, 762 n.3 (9th Cir. 1992); *NRDC v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977).[4] Even

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[4] Under the CWA, EPA may issue nationally applicable general permits from point sources that (1) all involve the same or similar types of operations; (2) discharge the same types of

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when an NPDES permit enforces nationally applicable technology-based effluent limitations, EPA may prescribe other conditions to protect the particular water quality values that may be disturbed by a particular pollutant discharge. 33 U.S.C. 1342(a)(2).

Given these differences in the programs established by FIFRA and the CWA, it is plain that registration of a pesticide under FIFRA does not take into account the range of considerations necessary for determining whether a particular discharge of a pesticide into a particular water body should be permitted under the NPDES program. In performing the generalized cost-benefit analysis under FIFRA, EPA is not required to take into account the effluent limitations established by the CWA and could not practically consider the particular environmental conditions existing at a particular water body. Because the NPDES permitting process ordinarily calls for a case-by-case analysis of the effects of particular discharges into particular water bodies, it would be altogether infeasible for EPA to use the FIFRA registration process to ensure that all relevant CWA requirements are met.

The need for separate analyses under the CWA and FIFRA is equally true for pesticides such as Magnacide H, which are applied directly into waters. In approving the registration of that pesticide, EPA

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wastes; and (3) require the same or similar monitoring. 40 C.F.R. 122.28.

concluded that the overall economic benefits of allowing the use of the product outweigh adverse environmental effects. EPA did not analyze, was not required to analyze, and could not feasibly have analyzed, whether, or under what conditions, the product could be discharged from a point source into particular public water bodies in compliance with the CWA. In approving the registration of Magnacide H, EPA did not warrant that a user's compliance with the pesticide label instructions would satisfy all other federal environmental laws. Indeed, EPA approves pesticides under FIFRA with the knowledge that pesticides containing pollutants may be discharged from point sources into the navigable waters only pursuant to a properly issued CWA permit.

In two provisions, FIFRA does require EPA to consider the applicability of other statutes, but neither provision involves the CWA. In determining whether a pesticide constitutes an "imminent hazard," EPA must consider whether the pesticide will pose hazards to species listed as endangered or threatened under the Endangered Species Act, 16 U.S.C. 1531 et seq. 7 U.S.C. 136(*l*). Similarly, in determining whether use of a pesticide may leave harmful residues on food, EPA must consider the standards established by the Federal Food and Drug Control Act, 21 U.S.C. 346a. 7 U.S.C. 136(bb). The explicit requirements that EPA consider other statutes in approving a pesticide under FIFRA, and the absence of any requirement that EPA consider the CWA in approving a pesticide under FIFRA, suggests

that Congress had no intent to require EPA to consider the CWA in making FIFRA decisions.

In granting summary judgment to TID, the district court relied on an EPA fact sheet for a pesticide containing copper sulfate, which mandated the inclusion of a label statement that an NPDES permit would be required to discharge the pesticide into navigable waters. Slip Op. 13. The district court reasoned that, because the Magnacide H label approved by EPA does not contain a similar statement, EPA must have concluded that no NPDES permit would be required. That reasoning is faulty. While EPA may on occasion require pesticide manufacturers to include statements on their labels regarding the application of laws other than FIFRA, nothing in FIFRA or the CWA requires that EPA must do so. The absence of such a statement on a pesticide label does not mean that EPA has concluded that use of the pesticide is always consistent with all other statutes. Indeed, EPA has issued a public notice that the absence of a label statement regarding the possible need for a NPDES permit "does not relieve a producer or user of such products from the requirements of the Clean Water Act." Pesticide Regulation (PR) Notice 95-1 (May 1, 1995), available at http://www.epa.gov/opppmsd1/PR_Notices/pr95-1.html. As discussed below, EPA deserves deference for that reasonable construction of the statutes it administers.

B. This Court's Cases Hold that Compliance with FIFRA Does Not Obviate the Need to Comply with Other Environmental Laws

The district court's decision is inconsistent with this Court's cases. As this Court has made clear, compliance with FIFRA does not relieve a party of its independent obligations under other statutes. Thus, this Court has twice held that EPA's registration of a pesticide under FIFRA does not relieve an agency of its independent obligations under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321-4370C. NEPA requires federal agencies to analyze the environmental impacts of major federal actions. 42 U.S.C. 4332. When an agency plans to use a pesticide approved by EPA under FIFRA, the agency cannot rely on the environmental analysis conducted in the FIFRA registration process. This Court thus stated: "[T]he mere fact that a program involves use of substances registered under FIFRA does not exempt the program from the requirements of NEPA." *Oregon Environmental Council v. Kunzman*, 714 F.2d 901, 905 (9th Cir. 1983). See also *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1248 (9th Cir. 1984). As this Court recognized, the analysis required under NEPA to examine a specific application of a pesticide is not equivalent to the more generalized analysis required under FIFRA. See *ibid.* ("The EPA registration process for herbicides under FIFRA is inadequate to address environmental concerns under NEPA."). See also *Dithiocarbamate Task Force v. Environmental Protection Agency*, 98 F.3d 1394, 1401 (D.C. Cir. 1994)

(holding that EPA analysis under FIFRA is inadequate to satisfy RCRA).[5]

The same conclusion applies here. The environmental analysis necessary to register a pesticide under FIFRA is not equivalent to the analysis required to determine whether a pollutant may be discharged under the CWA. As a result, EPA's approval of a pesticide under FIFRA does not mean that it may be used without a CWA permit.

The district court's decision has the effect of holding that FIFRA repeals by implication the CWA's requirement for a NPDES permit. As the Supreme Court has held, however, "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Mancari*, 417 U.S. at 551. No repeal by implication may be found here because FIFRA and the CWA are not irreconcilable. A pesticide user may comply with both statutes by following the instructions

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[5] When EPA registers a pesticide under FIFRA, its FIFRA analysis does satisfy its obligations under NEPA to examine the environmental impacts of the registration itself. See *Merrell v. Thomas*, 608 F. Supp. 644 (D. Or. 1985), aff'd 807 F.2d 776 (9th Cir. 1986). The *Merrell* court clearly understood, however, that separate analysis under NEPA may be required for a specific application of a pesticide: "[A]n agency engaged in a program of pesticide use, to which NEPA does apply, cannot rely solely on a FIFRA registration as a substitute for its own obligation to prepare an impact statement analyzing the environmental impacts of using a certain herbicide in a given location." 608 F. Supp. at 646.

on the pesticide label and, where the use of the pesticide constitutes the discharge of a pollutant from a point source into the navigable waters, the pesticide user must also obtain an NPDES permit.[6]

C. EPA Deserves Deference for Its View that Compliance with FIFRA Does Not Satisfy the CWA

The agency that administers a statute is entitled to deference for its reasonable resolution of statutory silence or ambiguity. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-843 (1984). As discussed above, nothing in the CWA and FIFRA establish that compliance with the instructions on a pesticide label relieves a party of the need for a permit under the CWA. If this Court were to find any ambiguity in the statutes on this question, however, the Court must nonetheless defer to the reasonable conclusion of EPA, which administers both statutes, that compliance with FIFRA does not necessarily satisfy the requirements of the CWA.

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[6] It has been held that other federal statutes do not repeal by implication the application of the CWA. See *Hudson River Fishermen's Association v. City of New York*, 751 F. Supp. 1088, 1099-1100 (S.D.N.Y. 1990) ("Clearly, the Safe Drinking Water Act does not provide adequate justification for ignoring the express and unambiguous directive of the previously adopted Clean Water Act."); *Environmental Defense Fund v. EPA*, 598 F.2d 62-77-78 (D.C. Cir. 1978) (Toxic Substances Control Act does not repeal by implication provision of CWA)

EPA has consistently recognized that compliance with FIFRA does not ensure compliance with other environmental statutes. EPA thus concluded that registration of a pesticide under FIFRA "does not mean, however, that materials treated with pesticides should not be managed in a controlled manner under RCRA [the Resource Conservation and Recovery Act, 42 U.S.C. 6901-6992k]." 55 Fed. Reg. 11,798, 11,839 (March 29, 1990).[7] Similarly, pesticides may be regulated by EPA under both FIFRA and the Clean Air Act. See 58 Fed. Reg. 28,094 (May 12, 1993). The same is true for the CWA; compliance with FIFRA does not ensure compliance with the CWA. See 55 Fed. Reg. 50450, 50451 (1990) ("If Congress intended either FIFRA or the CWA to be the exclusive statutory basis for regulating several aspects of the wood preserving industry, the relevant statutes would have so stated."); *id.* at 50462 ("[W]hile labeling under FIFRA is one mechanism that could be used to regulate certain wood treatment drippage and spills, the Agency does not agree that it is the best or only approach.").

EPA's construction of the statutes it administers is reasonable and is entitled to deference. In enacting FIFRA, Congress mandated that pesticide users must comply with the label instructions on registered

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[7] See also *id.* at 11,838 ("[T]hese wastes may be regulated under both FIFRA and RCRA."); 58 Fed. Reg. 8102, 8114 (Feb. 11, 1993) ("[B]oth FIFRA and RCRA requirements may apply to the pesticide waste."); 55 Fed Reg. 11798, 11838 (March 29, 1990); 50 Fed. Reg. 18,622, 18625 (May 1, 1985) ("[T]he statutory standards under RCRA and FIFRA are different.").

pesticides; in enacting the CWA, Congress mandated that pollutants may only be discharged into the navigable waters from a point source with a permit. Putting these two statutory schemes together, EPA reasonably concludes that FIFRA labeling does not relieve the pesticide user from the obligation to comply with any applicable permitting requirements of the CWA. That reasonable conclusion deserves deference.

The contrary conclusion suggested by the district court threatens to do considerable damage to EPA administration of FIFRA. The district court's decision suggests that, in order to register a pesticide under FIFRA, EPA must determine whether the use of the pesticide would be consistent with the CWA and, perhaps, with all statutory programs administered by EPA. Requiring such determinations would significantly increase the burden on EPA in administering FIFRA and would require a significant increase in resources in order to do so, since a pesticide registration would have to be reviewed by many other offices in EPA.[8] In addition to the considerable resource

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[8] Although the district court's decision is not altogether clear on this point, EPA perhaps could comply with the district court's understanding of the interrelationship between FIFRA and other statutes administered by EPA by requiring that all pesticide labels bear a statement that pesticide users must comply with other applicable laws. Requiring such a statement on all pesticide labels would impose considerable costs on all pesticide manufacturers, who would have to re-label all pesticide packages that lack such a statement. Nothing in FIFRA, however, imposes a requirement that labels bear warnings regarding the application of other laws. See 7 U.S.C. 136(q)

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implications of the district court's ruling, the decision suggests that FIFRA provides EPA with authority to extend or restrict the jurisdiction of other statutes. That suggestion is at odds with both FIFRA and the CWA. In order to register a pesticide under FIFRA, EPA must determine only that it meets the criteria spelled out in FIFRA; it need not consider the reach of other statutes that may also govern the use of such pesticides in certain circumstances.

CONCLUSION

For the foregoing reasons, the district court's ruling should be reversed.

Respectfully submitted,

OF COUNSEL:
GARY S. GUZY
Acting General Counsel

ROBERT G. DREHER
Deputy General Counsel

KARYN WENDELOWSKI
MARK DYNER
Attorneys
United States Environmental Protection Agency
Washington, D.C. 20044

LOIS J. SCHIFFER
Assistant Attorney General
EVELYN YING
JARED A. GOLDSTEIN
/s/ Jared A. Goldstein
Attorneys
Environment & Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

(defining misbranded labels); 40 C.F.R. Part 156 (establishing FIFRA label requirements).

APPENDIX B

September 23, 2009 – Draft

The following table provides EPA's current estimates of the number of applicators and applications of pesticides that fall within pesticide use patterns that result in the application of pesticides to and over, including near, waters of the United States. The information has not undergone peer review, and EPA intends to update these estimates as additional data become available.

There are two main limitations to the data provided. First, there is not a direct source of information on the number of applicators and applications made for these pesticide use patterns. As a result, the estimates were derived from secondary sources of information, and generalizing assumptions were sometimes made. The second limitation is that the definition of an application and an applicator is derived from the best available data by use pattern. Therefore the definition may be different by use pattern. More detail, by pesticide use pattern, is provided in the calculation notes.

Following the table is a listing of information sources used in EPA's estimation of the number of pesticide applicators and applications. Information sources are listed by pesticide use pattern.

NPDES Applicator & Application Estimates

Use Patterns	Number of Applicators	Number of Applications	Calculation Notes
Mosquito Adulticides	1,200	461,450	There are 400 mosquito abatement districts and approximately 800 other public agencies that apply mosquito control pesticides – it is assumed that each represents an applicator. There were 103 million acre-treatments with insecticides in 2005 (99 million for adulticides and 4 million for larvicides). Assuming that 77% of adulticide applications are made by ground and 23% are made by air and that an average adulticide application by ground covers 180 acres and that an adulticide application by air covers 600 acres, there are an estimated 461,450

			annual adulticide applications.
Mosquito Larvicides	1,200	18,800	There are 400 mosquito abatement districts and approximately 800 other public agencies that apply mosquito control pesticides – it is assumed that each represents an applicator. There were 103 million acre-treatments with insecticides in 2005 (99 million for adulticides and 4 million for larvicides). Assuming that 77% of larvicide applications are made by ground and 23% are made by air and that an average larvicide application by ground covers 180 acres and that a larvicide application by air covers 600 acres, there are an estimated 18,800 annual larvicide applications.

Aquatic Weed Control – Lakes and Ponds	23,200	4,524,000	OPP data show approximately 23,200 applicators holding certification in the aquatic category. The estimate of applications to lakes, ponds, irrigation systems and waterways is the result of 23,200 multiplied by 1 application per day over 195 work days (5 work days per week multiplied by 39 weeks [9 months of the year]), which equals 4,524,000 applications per year. EPA cannot determine what applications are made to each site, so one overall number has been calculated for all aquatic weed control in lakes, ponds, irrigation systems, and waterways.

Aquatic Weed Control – Irrigation Systems and Waterways	See Aquatic Weed Control – Lakes and Ponds	See Aquatic Weed Control – Lakes and Ponds	See Aquatic Weed Control – Lakes and Ponds
Aquatic Weed Control – Ditchbanks	330,000	660,000	About 15%, or 330,000, of 2.2 million U.S. farms are irrigated. EPA assumes that each farm is treated twice per year. This does not account for types of irrigation.
Aquatic Nuisance Animal Control	Not Available	Not Available	Includes use of pesticides for the control of fish, lampreys, and mollusks. EPA currently does not have an estimate of the number of applicators and applications within this use pattern.
Wide Area Pest Control – Insects	170	5,000	Based on grasshopper & Mormon cricket control. Estimate of 5 million acres treated with a minimum of 1,000 acres per application. This is a low estimate because

			it does not include east of the Mississippi, and parts of west. Number of applicators is based on NAAA survey estimate of available aircraft.
Wide Area Pest Control – Invasive Weeds	5,000	10,000	Herbicides are usually not feasible for control of large wide area infestations. They are most likely used to control and/or eradicate smaller newer infestations. Applicators may be individual landowners or government agencies. No data is available for number of applicators and applications, but EPA estimates that there are at least 5,000 applicators and 10,000 applications, and that these estimates may be low.
Forestry	4,500	4,500	There are 5,175 tracts of forest in the U.S. and 2.7 million acres of

			forest are treated per year. Assuming that an average pesticide application to forests is 600 acres (based on NAAA survey), the number of applications is calculated as the number of acres treated per year divided by the number of acres treated per application. It is assumed that the 4,500 applications are evenly distributed across the 5,175 forest tracts, thus it is assumed that there is one applicator per treated tract. The estimate of the number of applications and applicators may be low because data are not available on pesticides applied by ground.
Total	365,270	5,683,750	

NPDES Applicator & Application Information Sources

Mosquito Control

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IN THE
Supreme Court of the United States

AMERICAN FARM BUREAU FEDERATION,
AMERICAN FOREST & PAPER ASSOCIATION, AND
NATIONAL COTTON COUNCIL,
Petitioners,

v.

BAYKEEPER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

ELLEN STEEN
Counsel of Record
CLIFTON S. ELGARTEN
JESSICA A. HALL
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
(202) 624-2500

Counsel for Petitioners

OF COUNSEL

DANIELLE QUIST
AMERICAN FARM BUREAU FEDERATION
600 Maryland Ave., SW
Suite 1000W
Washington, DC 20024

WILLIAM R. MURRAY
AMERICAN FOREST & PAPER ASSOCIATION
1111 – 19th Street, NW
Suite 800
Washington, DC 20036

WILLIAM A. GILLON
GILLON & ASSOCIATES, PLLC
1163 Halle Park Circle
Collierville, TN 38017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
ARGUMENT 1

TABLE OF AUTHORITIES

Page

Cases

Envtl. Def. Ctr., Inc. v. EPA,
344 F.3d 832 (9th Cir. 2003) 6

Saint John's Organic Farm v. Gem County Mosquito Abatement Dist.,
574 F.3d 1054 (9th Cir. 2009) 10

Waterkeeper Alliance, Inc. v. EPA,
399 F.3d 486 (2d. Cir. 2005) 6

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Waterkeepers N. Cal. v. State Water Res. Control Bd., 2001 WL 35909033 (Cal. Super. Ct. No. 2001-022050) (Complaint) 7

ARGUMENT

The Government agrees that the Sixth Circuit erred in ruling that the Clean Water Act ("CWA") unambiguously requires the regulation of pesticide use as the "discharge of a pollutant" and in vacating the 2006 Rule. The Government also agrees that the decision below effectively overturns three decades of consistent EPA practice and does not dispute that it will produce the largest expansion of this regulatory program since its inception. Further, the Government does not dispute that the ability to promptly apply pesticides in response to outbreaks of insects and other pests is essential to the protection of our public health, food supply, and biosecurity.

The Government nonetheless opposes the petition because the court below did not, in terms, purport to override *Chevron*, but merely *misapplied* it. U.S. Br. 12. Further, the Government opines that the stay of the court's mandate until April 2011 "should provide EPA and other authorized permitting agencies sufficient time to develop and issue general CWA permits to cover the activities at issue." *Id.* 16. Thus, the Government sees "no pressing need for this Court's review." *Id.*

Contrary to the Government's suggestion, recitation of the *Chevron* standard ought not insulate from review a decision that on its face disregards *Chevron*'s principal directive. In cases involving review of agency rules, it would be the rare circuit panel that failed to quote (correctly) the *Chevron* standard. The decision below nevertheless conflicts with *Chevron* by rejecting the agency's reasonable interpretation and long-standing practice in favor of the court's *ipse dixit* declaration of the statute's meaning – with scant reference to any of

the traditional tools of statutory interpretation. By articulating an analysis that omits much of what *Chevron* requires, the Sixth Circuit's decision creates harmful precedent every bit as much as a lower court's explicit effort to override *Chevron* (if that can even be imagined).

Beyond the mischief it does to principles of respect for agency interpretation and congressional delegations of authority, the decision below warrants review because it will misallocate resources within an important federal regulatory program, needlessly burden the regulated public, and increase risks to public health and our food supply.

The Government suggests that EPA's anticipated "general permit" will mitigate the administrative burdens resulting from the decision. But general permitting merely makes it *possible* to issue NPDES permits for *some portion* of the affected activities. This does nothing to diminish the importance of a decision that shifts limited resources to the regulation of pesticide use through a program ill-suited to that task – rather than through the programs Congress carefully crafted to address the water quality impact of pesticide use (including non-regulatory CWA programs). *See* AFBF Pet. 4-6.

Moreover, the anticipated EPA general permit will not alleviate the burdens imposed on the *public*. It will not, for example, cover all pesticide uses affected by the decision – instead leaving many with no practical means of obtaining authorization to use pesticides. Nor is there any cause to believe that the 45 cash-strapped *state agencies* responsible for permit issuance will improve upon EPA's effort. Further, as described below, even if EPA- or State-issued permits do authorize a particular pesticide

use, authorization will come with a set of permit conditions so complex, burdensome, and costly as to effectively preclude pesticide use by individuals and small businesses. *See infra* p. 10-11. This Court's review is necessary to avoid the needless imposition of such constraints on activities essential to the protection of our health, crops, and forests.

1. The Government asserts that review is unnecessary because "[t]he court of appeals recited the correct standard under *Chevron* and did not purport to articulate a new analytic framework for review of agency rules." U.S. Br. 12. The Government thus equates rote recitation of the *Chevron* standard with adherence to *Chevron*'s teaching.

Yet it is neither necessary nor sufficient for the court to properly recite the *Chevron* standard. What *is* required is a serious consideration of whether Congress has directly spoken to the precise question at issue – based on examination of the relevant statutory provisions, the broader statutory scheme and context, and other traditional tools of construction. *See* AFBF Pet. 26-28. The Sixth Circuit undertook no such analysis, but simply declared the meaning of the statute to be plain. *See* AFBF App. 24a-25a.

The court *failed entirely* to examine whether EPA's interpretation of the statutory text (*e.g.*, "pollutant . . . from a point source") was plausible (instead finding that the text does not *require* a "temporal" connection between the "pollutant" and the "point source"). AFBF Pet. 22-23. The decision also omits any discussion of statutory and historical context (aside from the general statutory purpose), as well as the agency's contemporaneous and long-

standing practice of not requiring NPDES permits for pesticide use.[1] *See* AFBF Pet. 22-25, 27-28. The Government concedes as much, pointing out that the Sixth Circuit found the statute unambiguous "notwithstanding the Act's silence as to the temporal issue of when such pesticide loses its character as product and becomes a pollutant; EPA's past practice of not requiring permits for such discharges (p. 2, *supra*); and FIFRA's specific regulation of pesticide use (pp. 3-4, *supra*) . . . ." U.S. Br. 11.[2] Such an analysis plainly conflicts with *Chevron*.

2. Respondent Baykeeper finds nothing particularly significant about the expansion of the NPDES program to cover 5.6 million pesticide applications each year by more than 365,000 entities, asserting that prior judicial expansions of the program have been "at least as 'dramatic' as this one." Baykeeper Br. 32-33.[3] While the numbers

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[1] Baykeeper cites EPA's 1999 amicus brief in *Headwaters v. Talent* to suggest that EPA has historically interpreted the CWA to require permitting for the use of pesticides in water. *See* Baykeeper Br. 3, 27 n.14. This is simply not true. The 1999 amicus brief established no EPA policy concerning the regulation of pesticide use under the CWA. *See* AFBF App. 185a.

[2] The Government's response belies Baykeeper's unsupported assertion that the court "tested" its plain meaning conclusion "against the structure, purpose, and history of the statute." Baykeeper Br. 13.

[3] The Government, for its part, downplays the number of entities affected by referring to "*thousands* of persons and businesses" and "*thousands* of applications." "Thousands" is literally correct only because it literally encompasses the *hundreds of thousands* of people and businesses, and *thousands*

(continued...)

speak for themselves,[4] the importance of the decision below derives not only from the number of activities affected, but also from the diversity of those activities: the use of thousands of chemical and biological products to increase the productivity of forest and crop land, to protect those resources from insect and disease outbreaks, to maintain irrigation and other ditches, to control aquatic weeds and invasive species, and to reduce mosquito populations, among other uses. Never have EPA and authorized States been challenged to quickly implement a mechanism to authorize so diverse a universe of "discharges." Nor have they ever been called upon to apply "best available technology" to minimize and *eliminate* the discharge of a so-called "pollutant" that is in fact a beneficial and often essential product.

(continued)
of thousands of pesticide applications each year that EPA estimates will be affected. *See* AFBF Pet. 16.

[4] The two examples cited by Baykeeper brought into the program some 350,000 and 70,000 facilities, respectively. *See* Baykeeper Br. 33 n.16; AFBF Pet. 15-16. Although Baykeeper suggests that EPA's estimates are "likely to be exaggerated," the true number of affected pesticides users is undoubtedly much larger than EPA's estimates. *See* AFBF Pet. 16; Baykeeper App. 26-28 (EPA explanation of low estimates). In addition to entirely omitting applications to crops, EPA grossly under-estimates (at 4,500) the number of applications on forest lands. A 2006 USDA survey found *928,000* private, non-industrial family forest owners reported applying pesticides to their lands over the previous five years. *See* Butler, Brett J., Family Forest Owners of the United States, 2006, (U.S.D.A., Forest Service, Northern Research Station, June 2008) 65, Table US-22.

3. The Government ignores and Baykeeper mocks (at 4) Petitioners' concern over the public health, food supply, and biosecurity threat posed by the imposition of NPDES restrictions on pesticide use. Yet neither disputes that pesticides play an essential role in the protection of the U.S. food supply and the control of mosquito-borne disease. Instead, Respondents ask the Court to assume that EPA and 45 State agencies[5] will issue general permits to authorize any pesticide use that is important for public health and food production. Such reliance would be misplaced.

a. To trust that general permits will be available for pesticide users, one must assume not only that they will be *issued*, but also that they will be *upheld* in the likely event of judicial challenges. NPDES "general permits" are entirely a product of EPA regulations, with no express statutory authority and a dubious track record in litigation. *See Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 498-500, 503-04 (2d Cir. 2005) (invalidating aspects of EPA rules for general permits for animal feeding operations based on failure to require agency approval and public participation on site-specific control plans); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 852-58 (9th Cir. 2003) (invalidating aspects of EPA rules governing general permits for municipal stormwater discharges for failure to require agency

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[5] 46 States are authorized to administer the NPDES permitting program. EPA reportedly will serve as the permitting authority for Alaska, however, in addition to the four unauthorized States.

approval and public participation on individual municipalities' pollution control programs).[6]

b. EPA's yet-to-be-proposed general permit will authorize only a small fraction of the newly regulated pesticide applications nationwide. The EPA permit will apply in only five States. In addition, EPA reportedly plans to cover only a finite list of "use patterns," leaving *no permit coverage* – and great vulnerability to litigation and penalties – for any other pesticide use that occurs in any proximity to waters. Moreover, EPA's permit reportedly will *not* authorize pesticide application to, over, or near waters with particularly high or low water quality ("outstanding natural resource" waters or waters identified as not meeting standards). Thus, the permit will not authorize pesticide use in, over, or near such waters *regardless of the human consequences and regardless of the actual environmental impact of the application.*[7]

c. Respondents offer assurances that EPA's general permit may mitigate administrative burdens by serving as a "model" for States to follow. Baykeeper Br. 32; U.S. Br. 15-16. But with or without EPA's "model," administering a permitting

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[6] Indeed, Baykeeper itself challenged California's "emergency" general permit authorizing certain aquatic pesticide uses in response to the decision in *Headwaters v. Talent*. *See Waterkeepers N. Cal. v. State Water Res. Control Bd.*, 2001 WL 35909033 (Cal. Super. Ct. No. 2001-022050). That lawsuit was settled.

[7] For example, in a remote forested area where pristine waters are present, forest canopy spray to control an outbreak of defoliating gypsy moth would not be authorized.

regime for pesticide use will be – for States that choose to undertake it – a resource intensive and costly process. *See* AFBF App. 147a-161a. Issuing general permits is only the first challenge. Afterwards comes the burden of defending those permits in litigation, processing and reviewing "notices of intent" and other submissions, addressing the need for water quality-based requirements for particular waters, enforcing permit compliance, responding to requests for individual permits where general permit coverage is unavailable, and reissuing each permit every five years in perpetuity.

Neither Respondent suggests that all, or even most, authorized States have begun to develop permits in the year since the decision below. Thus, what is "purely speculative" is not whether food production and disease control will be disrupted by NPDES regulation (Baykeeper Br. 30), but whether 45 States will issue broadly applicable permits authorizing pesticide use in, over, and near waters – let alone that they will do so by April 2011.

Baykeeper touts four States – California, Oregon, Washington, and Nevada – as having implemented NPDES permitting for some aquatic pesticide use prior to the decision below. Baykeeper Br. 31. Yet even these States have only issued permits for narrowly defined uses (*e.g.*, mosquito larvicides (California and Washington) and irrigation ditch/aquatic weed control (California, Nevada, and Washington)). Oregon has no general permit in effect and none proposed. And between them, the remaining three States have only two narrow new draft permits in evidence on their websites (non-native invasive aquatic animals and algae in Washington, and mosquito adulticides in

California). A search (the week of this filing) of the websites of several States likely to have large numbers of affected pesticide users – Florida, Louisiana, and Mississippi – revealed no indication of permit development.[8]

d. Absent this Court's review, anyone needing to apply pesticide in, over, or near "waters of the United States" will be precluded from doing so unless the application is authorized under an EPA- or State-issued NPDES permit. Whether Respondents acknowledge it or not, it is a virtual certainty that thousands of farmers, forest landowners, mosquito control agencies, and others will face the "stark binary choice" (Baykeeper Br. 31) of forgoing pesticide use or risking CWA liability. Mosquito control and wide-area insect and disease control, in particular, will typically be impossible without a release of pesticide "over" waters of the United States.

Some pesticide users who lack a feasible permitting option will attempt to apply in a manner that avoids features that might be deemed waters of the United States. Yet, if there are streams or even ditches in the area, they can only *lower* the risk of enforcement by the government or citizens alleging that pesticides have fallen into "waters" as a result of the application. Such claims carry potential penalties of up to $37,500 per violation per day. Those who opt to settle rather than incur the cost of litigation and the risk of an adverse decision,

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[8] *See* http://www.dep.state.fl.us/water/permits.htm; http://www.deq.state.la.us/portal/tabid/243/Default.aspx; and http://www.deq.state.ms.us/MDEQ.nsf/page/epd_epdgeneral.

moreover, will typically be required to pay plaintiff's attorneys' fees regardless of their good-faith efforts to comply with the law. *See Saint John's Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054, 1062 (9th Cir. 2009) (fee awards "should be the rule rather than the exception" for "prevailing" plaintiff achieving settlement of CWA claims).

e. Those whose pesticide uses *are* addressed in EPA- or State-issued NPDES permits will be only marginally better off – operating under a paperwork intensive, technically complex, and costly regulatory regime. Notwithstanding Baykeeper's remark that "permitting should be relatively easy," Baykeeper Br. 32, "easy" is not an adjective commonly applied to NPDES permitting. *See* Brief of Members of Congress as *Amici Curiae* Supporting Petitioners 15-19 (describing the complexity of general permit compliance and detailing the requirements of Washington's aquatic pesticide permits).

California's current draft general permit for adult mosquito control, for example, is *90 pages long*.[9] The draft would require pesticide users to submit and comply with a Pesticides Application Plan ("PAP") with elements including:

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[9] *See* Statewide General National Pollutant Discharge Elimination System Permit for Pesticides Spray Applications to Waters of the United States to Control Adult Mosquitoes, General Permit No. CAG XXXXXX, available at http://www.waterboards.ca.gov/water_issues/programs/npdes/docs/adulticides/draftpermit4comment.pdf.

(1) a "discussion of the factors influencing the decision to select spray applications";

(2) the types of pesticides used and methods of application;

(3) "other control methods used (alternatives) and what their limitations are";

(4) "how much product is needed and how this is determined";

(5) a monitoring plan;

(6) an "off-target drift management plan";

(7) an "evaluation of available [best management practices ("BMPs")] to determine if there are feasible alternatives to the selected pesticide application project that could reduce potential water quality impacts"; and

(8) a description of BMPs to be implemented.

Id. § VIII.E. Permittees would be required to maintain logs of each pesticide application, including the date, location, name of applicator, time application started and stopped, application rate and concentration, wind speed and direction, vehicle speed, and "visual monitoring assessment", among other details. *Id.* § VIII.F. Landowners or other applicators who fail to comply with any such permit requirements (notwithstanding their good faith efforts) will be subject to civil penalties of up to $37,500 per violation. *See* AFBF Pet. 4.

4. Baykeeper alone – not the Government – suggests that Petitioners' concerns about the impact on crop protection are unfounded because "terrestrial (land-based) pesticide applications [are]

outside the scope of this opinion." Baykeeper Br. 4 (arguing the decision reaches only "aquatic" pesticides). As the Government seems to recognize, the Sixth Circuit's opinion is not so limited. Indeed, the 2006 Rule itself offered an "example" of a covered *non-aquatic* application: "when insecticides are *aerially applied to a forest canopy where waters of the United States may be present below the canopy*." AFBF Pet. App. 111a (emphasis added).[10]

Given that application of pesticides to forests was within the scope of the Rule (and particularly in light of the Sixth Circuit's "but for" test), it is reasonable to conclude that EPA will find itself constrained to deem agricultural pesticide use a "point source" discharge if pesticide (in any amount) falls directly into waters of the United States. There is no question that this occurs, particularly where water-dependent crops (such as rice and cranberries) are grown *within* "waters of the United States" – or where the very *irrigation ditches* running within and among a farmer's fields are deemed to be "waters of the United States." Although neither Petitioners nor Respondents know *how many* farmers will be

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[10] Baykeeper is certainly correct that the CWA exempts agricultural *stormwater* and irrigation return flows. Baykeeper Br. 20-21. But there is no explicit statutory exemption for pesticide that simply falls into waters during use – presumably because Congress never imagined pesticide use would be viewed as a "discharge of a pollutant" under any circumstances. Nevertheless, Petitioners certainly will continue to contend that the application of pesticide to crops, and to forests for that matter, *should* be viewed as a "nonpoint source" regardless of the deposition of pesticide into waters, based on Congress's clear intent not to require CWA permits for agricultural and silvicultural activities.

affected, it is implausible to suggest that crop protection is not threatened by the Sixth Circuit's ruling.

Respectfully submitted,

Ellen Steen
Counsel of Record
Clifton S. Elgarten
Jessica A. Hall
CROWELL & MORING LLP
1001 Pennsylvania Ave. NW
Washington, DC 20004-2595
(202) 624-2500

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In the Supreme Court of the United States

CROPLIFE AMERICA, et al.,
Petitioners,
v.
BAYKEEPER, et al.,
Respondents.

AMERICAN FARM BUREAU FEDERATION, et al.,
Petitioners,
v.
BAYKEEPER, et al.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN MOSQUITO CONTROL ASSOCIATION, NATIONAL ASSOCIATION OF STATE DEPARTMENTS OF AGRICULTURE, LOUISIANA DEPARTMENT OF AGRICULTURE AND FORESTRY, MINNESOTA DEPARTMENT OF AGRICULTURE, NORTH CAROLINA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, AND SOUTH DAKOTA DEPARTMENT OF AGRICULTURE IN SUPPORT OF THE PETITIONERS

Edward M. Ruckert
M. Miller Baker
Counsel of Record
RAHUL RAO
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, DC 20005
(202) 756-8000
Counsel for Amici Curiae

December 4, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Page

INTEREST OF THE AMICI CURIAE 1

ARGUMENT 2

I. The Sixth Circuit's Invalidation of the EPA Rule Seriously Jeopardizes the Public Health 2

II. The Sixth Circuit Decision Is Unworkable In Practice 5

III. The Sixth Circuit Decision Burdens Farmers and States and Exposes Them to CWA Liability for Pesticide Applications Otherwise Lawful Under FIFRA 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Nat'l Cotton Council of Am. v. EPA,
553 F.3d 927 (6th Cir. 2009) 5

Statutes and Rules

7 U.S.C. 136h (d)(1)(C) 7

Sup. Ct. R. 37.2 1

Sup. Ct. R. 37.6 1

Other Authorities

CDC, *Dengue Fever*,
http://www.cdc.gov/ncidod/dvbid/dengue/
index.htm 4

CDC, *Eastern Equine Encephalitis*,
http://www.cdc.gov/ncidod/dvbid/arbor/
eeefact.htm 4

CDC, *Malaria*,
http://www.cdc.gov/malaria/ 3

CDC, *Malaria Facts*,
http://www.cdc.gov/malaria/facts.htm 3

CDC, *St. Louis Encephalitis*, http://www.cdc.gov/ncidod/dvbid/arbor/sle_qa.htm 4

CDC, *West Nile Virus*, http://www.cdc.gov/ncidod/dvbid/westnile/index.htm 4

CDC, *Western Equine Encephalitis*, http://www.cdc.gov/ncidod/dvbid/arbor/weefact.htm 4

EPA and U.S. Center for Disease Control and Prevention, Joint Statement on Mosquito Control in the United States, *available at* http://www.epa.gov/pesticides/health/mosquitoes/mosquitojoint.htm#programs 3

Eradication of Malaria in the United States (1947-1951), *available at* http://www.cdc.gov/malaria/history/index.htm#eradicationus 3

Mosquito-Borne Diseases, American Mosquito Control Association, *available at* http://www.mosquito.org/mosquito-information/mosquito-borne.aspx 3

INTEREST OF THE AMICI CURIAE[1]

The American Mosquito Control Association ("AMCA"), the National Association of State Departments of Agriculture ("NASDA"), and the Louisiana Department of Agriculture and Forestry, Minnesota Department of Agriculture, North Carolina Department of Agriculture and Consumer Services, and South Dakota Department of Agriculture respectfully submit this brief as amici curiae supporting the petitions for a writ of certiorari filed in Nos. 09-533 & 09-547.

AMCA is a not-for-profit corporation controlled by state and local governmental agencies responsible for mosquito control and is supported primarily by member dues.[2] AMCA members are vitally interested in whether the use of mosquito pesticides in lawful compliance with the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") simultaneously constitutes, as the Sixth Circuit held, the unlawful discharge into water of "pollutants" within the meaning of the Clean Water Act ("CWA").

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[1] Pursuant to Rule 37.2, the counsel for amici state that all parties received at least ten-days notice of amici's intent to file this brief, and that all parties have given their consent to file. Pursuant to Rule 37.6, counsel for amici curiae further state that no counsel for a party authored this brief in whole or in part, and no person other than amici or its counsel made a monetary contribution to this brief.

[2] Although private industry applicators and manufacturers of pesticides are among AMCA's members, private industry interests collectively have only one vote on AMCA's sixteen-member board of directors. Public mosquito control agencies have the other fifteen votes.

NASDA represents the commissioners, secretaries, and directors of the state departments of agriculture in all fifty states and four U.S. territories. As co-regulators with the U.S. Environmental Protection Agency ("EPA"), a majority of NASDA's members are the lead state agencies responsible for administering, implementing and enforcing the laws regulating the production, labeling, distribution, sale, use and disposal of pesticides in their states.

The Louisiana Department of Agriculture and Forestry, Minnesota Department of Agriculture, North Carolina Department of Agriculture and Consumer Services, and South Dakota Department of Agriculture are state agencies with primacy in pesticide matters under FIFRA in each state, respectively. Environmental safety is a prime requisite in the pesticide programs implemented by each department. The Sixth Circuit's decision is likely to disrupt longstanding state regulatory programs and relationships, as well as negatively impact the significant economic contributions from agricultural production in these states.

ARGUMENT

I. The Sixth Circuit's Invalidation of the EPA Rule Seriously Jeopardizes the Public Health

The petitioners provide numerous and well-founded reasons why this Court should grant the petitions for writ of certiorari, but amici write separately to emphasize the potentially grave public health consequences of the flawed Sixth Circuit decision. That decision is a clear and present danger to the public health because it exposes mosquito

control organizations to CWA liability that will impede their mission.

A. Mosquito control is critically important to public health in the United States. *See* EPA and U.S. Center for Disease Control and Prevention ("CDC"), Joint Statement on Mosquito Control in the United States, *available at* http://www.epa.gov/pesticides/health/mosquitoes/mosquitojoint.htm#programs ("Mosquito control activities are important to the public health . . . ."). Worldwide, mosquitoes cause more human suffering than any other organism—over one million people die from mosquito-borne diseases every year.[3] One such disease is malaria.[4] Although malaria was eradicated in the United States during the twentieth century through the use of pesticides, the CDC cautions that "the two species [of mosquito] that were responsible for transmission prior to eradication . . . are still widely prevalent; thus there is a constant risk that malaria could be reintroduced in the United States."[5] Currently, only malaria prevention techniques—including the spraying of insecticides that target mosquitoes—prevent malaria from reemerging in the United States.

Although the current threat of malaria in the United States has abated, the same is not true of other mosquito-borne diseases. Specifically, St.

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[3] Mosquito-Borne Diseases, American Mosquito Control Association, *available at* http://www.mosquito.org/mosquito-information/mosquito-borne.aspx.

[4] http://www.cdc.gov/malaria/.

[5] http://www.cdc.gov/malaria/facts.htm. *See also* Eradication of Malaria in the United States (1947-1951), *available at* http://www.cdc.gov/malaria/history/index.htm#eradicationus.

Louis Encephalitis,[6] Eastern Equine Encephalitis,[7] Western Equine Encephalitis,[8] Dengue Fever[9] and West Nile Virus[10] are all still present in the United States. There is no known vaccine or effective cure for any of these diseases; they are prevented *only* by controlling mosquito populations. In particular, West Nile Virus—which is responsible for the most severe outbreak of mosquito-borne disease in the United States in decades—continues to impact many parts of the country. In the last ten years, over 1,000 Americans have died, and over 10,000 were hospitalized, some with severe permanent disabilities, from this mosquito-borne disease.

B. In the absence of any official guidance on which pesticide applications near water would require National Pollutant Discharge Elimination System ("NPDES") permits under the CWA, and the absence of any guidance on what acceptable permits would encompass, the Sixth Circuit decision's invalidation of the EPA Rule exposes all mosquito control programs in the United States to the imminent threat of CWA suits. Indeed, since the Sixth Circuit issued its decision, twenty-one local mosquito control agencies in California alone have been served by environmental groups with intent to sue notices under the CWA for alleged CWA violations (*i.e.*, using pesticides without an NPDES permit). Such litigation would serve only to disrupt these agencies' critically important efforts to control

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[6] http://www.cdc.gov/ncidod/dvbid/arbor/sle_qa.htm.

[7] http://www.cdc.gov/ncidod/dvbid/arbor/eeefact.htm.

[8] http://www.cdc.gov/ncidod/dvbid/arbor/weefact.htm.

[9] http://www.cdc.gov/ncidod/dvbid/dengue/index.htm.

[10] http://www.cdc.gov/ncidod/dvbid/westnile/index.htm.

mosquitoes and mosquito-borne disease. Further, the cost of defending such litigation and the risk of fines and liability for plaintiffs' attorney fees will compel many of these agencies to abandon essential mosquito control activities or risk bankruptcy.[11]

If the Sixth Circuit decision is allowed to stand, the threat of CWA liability will seriously disrupt or effectively halt many essential mosquito control efforts throughout the United States. This could result in a marked increase in the number of deaths and serious illnesses caused by mosquito-borne diseases such as West Nile Virus.

II. The Sixth Circuit Decision Is Unworkable In Practice

Aside from seriously jeopardizing the public health, the Sixth Circuit decision creates an unworkable legal regime.

A. The Sixth Circuit notes that under its interpretation of the CWA, not all chemical pesticide applications require an NPDES permit. *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 936 (6th Cir. 2009). However, the two circumstances identified by the Sixth Circuit as needing a permit under the CWA—where traces of pesticides applied on land or in the air end up in water, or where residues of aquatic pesticides remain in the water, *see id.* at 936-37—effectively require an NPDES permit for all chemical pesticide applications, because operators can never be absolutely certain that traces of such pesticides will not enter water (in the case of

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[11] The temporary stay of the mandate obtained by the government does not obviate this problem because the mere existence of the Sixth Circuit decision has a present *in terrorem* effect on the ongoing activities of mosquito control entities.

pesticides applied on land and in the air), or remain in the water (in the case of pesticides applied directly in the water). In practice, the Sixth Circuit decision will effectively require that operators obtain an NPDES permit for every pesticide application, regardless of when and where the application is made. Because the CWA imposes criminal as well as civil liability, pesticide applicators face enormous risks if they operate without an NPDES permit.

B. Moreover, as discussed previously, mosquito control activities are highly dependant on pesticides. Accordingly, the significant increase in permit applications that would result from requiring an NPDES permit for every mosquito control application would paralyze the permitting process and leave public health officials with no effective mechanism to control pest outbreaks. This is particularly the case given that mosquito control districts must decide within a very brief time which areas to treat for mosquitoes (a planning process that typically must be completed in the span of a few hours, to at most one or two days, if it is to be effective and where such treatment can occur at literally thousands of specific locations).

C. In the more than thirty-five years of administering the CWA, the EPA has never issued an NPDES permit for the application of pesticides. By including pesticide applications under the CWA, the Sixth Circuit decision greatly expands the number of entities that will now need an NPDES permit. Currently, the NPDES program encompasses approximately 520,000 permitted facilities. Under EPA estimates, at a minimum, the Sixth Circuit decision will require an additional 365,000 so-called "applicators" to seek permits for

approximately 5.6 million pesticide applications per year. This represents a nearly two-fold increase in the volume of NPDES permits to be issued.

Even if the stay of the mandate provides the EPA with sufficient time to expand the NPDES permitting system to encompass all of the pesticide "applicators" swept in by the Sixth Circuit decision, the NPDES process is essentially incompatible with the realities of pesticide use for mosquito control. First, EPA regulations require that NPDES permits include monitoring programs. But the extremely large costs of routinely monitoring the constituents of pesticides before and after each application at even a small fraction of application sites would exceed the operational budgets of most mosquito control programs. Second, this type of monitoring would also require dissemination to the mosquito control programs of information on the complete composition of pesticide products—information which, as proprietary business information under FIFRA, cannot be legally provided by EPA or the states to these entities. *See* 7 U.S.C. 136h (d)(1)(C). In other words, a legal NPDES permit would create a condition for which compliance may be impossible—requiring the monitoring of chemical constituents by dischargers notwithstanding the fact that the dischargers cannot legally be provided the names of the chemicals to be monitored.

III. The Sixth Circuit Decision Burdens Farmers and States and Exposes Them to CWA Liability for Pesticide Applications Otherwise Lawful Under FIFRA

In addition to mosquito control agencies, the Sixth Circuit decision has broad (and jarring) consequences for farmers and states.

A. The Sixth Circuit decision requires NPDES permits for aquatic pesticide applications as well as for many terrestrial applications. As all pesticide applications are already regulated under FIFRA, requiring NPDES permits in these circumstances will impose a series of unnecessary, costly and burdensome requirements on farmers. Additionally, at present, neither EPA nor state regulators have the required resources to review the dramatic increase in permit applications that will result from the Sixth Circuit decision. Because of the time-sensitive nature of pesticide applications, the resulting delays will adversely impact the viability of farming operations across the country. Moreover, by impeding necessary pesticide uses to quickly combat emergency infestations, the Sixth Circuit decision could impair food production.

States will also be burdened by the new regime created by the Sixth Circuit decision. Just as the EPA will be designing NPDES permits to comply with the Sixth Circuit decision, forty-five states will be similarly required to develop their own permits to comply with that decision. Under FIFRA, it is the state lead agencies—generally the state departments of agriculture—that have primacy of the enforcement of pesticide matters. The consequence of the Sixth Circuit decision creates a tremendous unfunded regulatory mandate for the state governments. The decision will require states—not just EPA—to issue permits to cover pesticide applications that are already regulated and legal under FIFRA and state pesticide laws, laws that also enforce against the misuse of pesticide applications.

B. Further, by extending its decision to terrestrial applications—under the theory that pesticide applications on land or air may nevertheless have CWA implications if such pesticides end up in navigable waterways—the Sixth Circuit has placed every farmer in the United States in legal jeopardy under the CWA's citizen-action provisions for applications of pesticides that otherwise conform to FIFRA. If the Sixth Circuit decision is left to stand, U.S. farmers—regardless of farm size or produce output—will go into the next growing season under the looming threat of lawsuits. Similarly, states and local governments that apply pesticides along roadways and power lines, among other locations, face the burden of potential CWA litigation if residues of such terrestrial applications that otherwise conform to FIFRA end up in the nation's waterways.

CONCLUSION

For the foregoing reasons, amici request that this Court grant the petitions for a writ for certiorari.

Respectfully submitted,

EDWARD M. RUCKERT
M. MILLER BAKER
Counsel Of Record
RAHUL RAO
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, DC 20005
(202) 756-8000

Counsel for Amici Curiae

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IN THE

Supreme Court of the United States

AMERICAN FARM BUREAU FEDERATION, *et al.*,
Petitioners,

v.

BAYKEEPER, *et al.*,
Respondents.

CROPLIFE AMERICA, *et al.*,
Petitioners,

v.

BAYKEEPER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AQUATIC ECOSYSTEM RESTORATION FOUNDATION, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

CARTER G. PHILLIPS*
ANGUS MACBETH
JAMES W. COLEMAN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

December 4, 2009

[Additional *Amici Curiae* Listed on Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Additional *amici curiae*:

Aquatic Plant Management Society
California Cotton Growers Association
Chamber of Commerce of the United States of America
Cranberry Institute
Kansas Cotton Association
Louisiana Cotton and Grain Association
National Agricultural Aviation Association
National Alliance of Forest Owners
National Association of Home Builders
National Council of Farmer Cooperatives
National Corn Growers Association
National Potato Council
National Sorghum Group
North Carolina Cotton Producers
Oklahoma Cotton Council
Plains Cotton Growers
Rolling Plains Cotton Growers
South Texas Cotton & Grain Association
Southern Cotton Growers
Texas Cotton Producers
USA Rice Federation
Western Growers Association

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
BACKGROUND AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE DECISION BELOW FAILS TO APPLY APPROPRIATE *CHEVRON* DEFERENCE	6
II. THE DECISION BELOW THREATENS THE NATION'S ABILITY TO PREVENT INFESTATIONS THAT ENDANGER THE PUBLIC WELFARE	12
CONCLUSION	16

TABLE OF AUTHORITIES

CASES — Page

Chevron U.S.A., Inc. v. *NRDC*, 467 U.S. 837 (1984) 6
Coeur Alaska, Inc. v. *Se. Alaska Conservation Council*, 129 S.Ct. 2458 (2009) 6
Erlenbaugh v. *United States*, 409 U.S. 239 (1972) 8
Rapanos v. *United States*, 547 U.S. 715 (2006) 9
Solid Waste Agency of N. Cook County v. *Army Corps of Eng'rs*, 531 U.S. 159 (2001) 4, 9

STATUTES AND REGULATIONS

7 U.S.C. § 136 *et seq.* 3
§ 136(j) 3
§ 136a 3, 7
16 U.S.C. § 760 *et seq.* 11
33 U.S.C. § 1251 ..... 2, 11
§ 1254 ..... 3, 6, 7, 10
§ 1270 note 11
§ 1311(a) 2, 4
§ 1319 5
§ 1342 ..... 3, 7
§ 1362 ..... 4, 9
42 U.S.C. § 9601 *et seq.* 11
§ 9603 11
§ 9607 12
40 C.F.R. § 19.4 5

LEGISLATIVE HISTORY

S. Rep. No. 92-414 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668 ..... 4, 8

TABLE OF AUTHORITIES—continued

OTHER AUTHORITY — Page

Random House Webster's Unabridged Dictionary (2d ed. 2000) 4, 10

INTEREST OF *AMICI CURIAE*[1]

Amici are trade groups representing a broad range of agricultural, forestry, and development interests. *Amici*'s members use pesticides to prevent or remedy disease, infestation, and other harmful invasions of pests that would otherwise threaten food, water, forests, and other resources on which the public depends. Their application of pesticides is strictly regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

The Sixth Circuit's decision in this case rejected an Environmental Protection Agency (EPA) rule, which had provided that pesticide applications made in accordance with FIFRA do not constitute a discharge of a pollutant requiring a Clean Water Act (CWA) permit. CropLife Pet. App. 1a–25a.

This decision will affect hundreds of thousands of people and entities, including small businesses and individual landowners. EPA has stated that this decision threatens

> significant disruption among the hundreds of thousands of persons and businesses nationwide who apply pesticides to, over, or near waters of the United States without NPDES [National Pollutant Discharge Elimination System] per-

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[1] Pursuant to Rule 37.6, *amici* state that counsel for the parties did not author this brief in whole or in part, neither party nor party counsel made a contribution intended to fund the preparation or submission of the brief, and no person or entity other than an *amicus* made any monetary contribution to the preparation or submission of this brief. Counsel for all parties have received timely notice of intent to file this brief and have consented to the filing, and the letters of consent have been filed with the clerk.

> mits and now, as a result of this Court's decision, will need to obtain permits in order to continue doing so consistent with the Clean Water Act.

EPA Mot. for Stay at 1, CropLife Pet. App. 106a–107a. This will affect a wide variety of organizations that, like *amici*'s members, use pesticides to control dangerous pests, such as "local government entities that spray to and over waters to control mosquitoes, farmers who apply pesticides to eradicate aquatic pests, [and] foresters who aerially spray over waters to prevent outbreaks of timber pests." *Id.* at 1, 107a.

Thus, the panel's decision will burden *amici*'s operations by subjecting an array of activities to broad and uncertain CWA liability. Imposition of CWA permit requirements unsuited to those activities will impede *amici's* ability to respond quickly and effectively to harmful pests, risking significant losses and imposing crippling costs. *Amici's* operations are essential to our Nation's supply of food, water, and shelter, and they are vitally affected by this case. Accordingly, *amici* believe that the Court will benefit from their views in evaluating the importance of the legal question presented by petitioner.

BACKGROUND AND SUMMARY OF ARGUMENT

A central objective of the Clean Water Act is that "the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1). In furtherance of this goal, the CWA forbids the unpermitted "discharge of any pollutant" from a point source. *Id.* § 1311(a). Accordingly, before anyone may lawfully discharge a pollutant, it is necessary to apply for and receive a permit under the "National

pollutant discharge *elimination* system," *id.* § 1342 (emphasis added).

The Sixth Circuit held that all biological pesticides and those chemical pesticides which result in "waste" in the water are pollutants under the statute and, when discharged to water from a point source, require an NPDES permit. The court held that the statute unambiguously precludes a contrary interpretation, and thus that there is no difference between farmers, landowners, and public health officials who treat crops, forests, and swamps to avoid dangerous infestations, and those who discharge industrial wastes into a river—under the Act, both types of discharges are to be eliminated. This result ignores common sense, does violence to the statute, and is contrary to this Court's direction in *Chevron* that deference is owed to the agency's interpretation of a statute it administers.

The provisions of the Clean Water Act relied on by the court of appeals do not mention pesticides. The only reference in the Act to pesticides is at 33 U.S.C. § 1254*(l)*, which authorizes EPA to "develop and issue to the States for the purpose of carrying out this chapter" studies on the effects of pesticides in water. Congress did not view pesticides categorically as harmful substances, requiring elimination. Just three days after passing the CWA, Congress enacted major revisions to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), which *balances* the risks and benefits of applying pesticides. 7 U.S.C. § 136 *et seq.* FIFRA forbids any distribution of pesticides unless they are registered, *id.* § 136a(a), and ensures that they are not used in a way that "cause[s] unreasonable adverse effects on the environment." *Id.* § 136a(d)(1)(B). "Environment" is specifically defined to include "water." *Id.* § 136(j).

During the Clean Water Act debates, Senator Dole stated: "[p]esticides provide substantial *benefits* to mankind by protecting plants and animals from pest losses." S. Rep. No. 92-414, at 92 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3760 (emphasis added). He went on to note that pesticides would continue to be beneficial: "[t]he use of pesticides and other agricultural chemicals will undoubtedly retain a high level of importance in agriculture for the foreseeable future." *Id.* And he noted that they would be regulated under FIFRA: "In the meantime efforts at both State and Federal levels are paying off in securing the registration [pursuant to FIFRA] and adherence to recommended usages." *Id.*

Nonetheless, the Sixth Circuit held that pesticides were unambiguously "pollutants" within the meaning of the CWA's § 301, which forbids the unpermitted "discharge of any pollutant" from a point source. 33 U.S.C. § 1311(a). The Sixth Circuit suggested that it was compelled to reach this result because "pollutant" is defined by the CWA to include "chemical wastes" and "biological materials." *Id.* § 1362(6). But in its myopic focus on the list of words defining "pollutant," the court lost sight of the word itself: a pollutant is a substance "that renders the air, soil, water, or other natural resource harmful." *Random House Webster's Unabridged Dictionary* 1498 (2d ed. 2000). In doing so, it gave the term "pollutant" "no effect whatever." *Solid Waste Agency of N. Cook County* v. *Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (*SWANCC*). Worse, the court prohibited EPA from giving any effect to the term "pollutant." EPA's view that the term "pollutant" cabined otherwise expansive terms such as "biological materials" was both reasonable and faithful to the statute. *Id.* That every fisherman's worm is

"biological material" does not make every cast of the rod without a CWA permit punishable by a $37,500 fine. 33 U.S.C. § 1319(b), (c); 40 C.F.R. § 19.4.

If left unaddressed, the Sixth Circuit's errors will have stark consequences. The NPDES permitting program currently encompasses approximately half a million permits; EPA has estimated that the decision below will expand the NPDES program to 5.6 million new pesticide applications *per year*. EPA Mot. for Stay at 11, CropLife Pet. App. 115a. And unlike most expansions of the NPDES program, which impose only economic burdens, this expansion threatens the ability of public health officials, forest owners, and farmers to prevent or remedy infestations that endanger the public welfare.

This case consolidated challenges from eleven circuits and settles the application of the Clean Water Act to pesticide discharges to the water. There will be no future split among the courts of appeals on the issue presented in this case. The Court should grant certiorari in this case to correct the dramatic misapplication of *Chevron* and to relieve the substantial burdens that this decision has placed upon farmers, landowners, and public health officials.

ARGUMENT

The Petition in this case effectively shows why this Court's review is warranted. Amici's purpose here is both to show that the implications of the decision below are sweeping and harmful and that those harms are not justified by any fair interpretation of the Clean Water Act. The Sixth Circuit ignored this Court's direction on the appropriate deference to an agency's interpretation of statutes which it administers, and this Court's decisions interpreting the Clean Water Act. Furthermore, this decision

leaves our Nation seriously vulnerable to destructive and dangerous infestations.

I. THE DECISION BELOW FAILS TO APPLY APPROPRIATE *CHEVRON* DEFERENCE.

a. It is axiomatic that the deference due an agency in interpreting a statute which it administers is governed by *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984). *Chevron* provides that a court must first determine if Congress has "addressed the precise question at issue," and, if not, defer to the agency interpretation so long as it is a "permissible construction of the statute." *Id.* at 843. This Court recently emphasized in a Clean Water Act case that the precise question at issue must be carefully formulated, and set out the question as the beginning of its analysis: "Do EPA performance standards and § 306(e), apply to discharges of fill material." *Coeur Alaska, Inc.* v. *Se. Alaska Conservation Council*, 129 S.Ct. 2458, 2469 (2009). When a court decides whether Congress has addressed the precise question, it should employ "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9.

In this case, at the level of greatest precision, the question at issue is how, if at all, the permit provisions of the CWA apply to the discharge to the water of chemical and biological pesticides for the purpose of controlling pests in or over the water.

The Sixth Circuit failed to ask this question or any question close to it. In fact pesticides are not addressed in the provisions of the statute on which the Sixth Circuit relied. Indeed, the statute's only mention of "pesticides" comes at 33 U.S.C. § 1254(*l*), which directs EPA to "develop and issue to the States for the purpose of carrying out this chapter" studies on the kind and extent of effects on health and

welfare from pesticides in water. *Id.* § 1254(*l*)(1). This provision is clearly at odds with the conclusion that pesticides are to be addressed under the NPDES system. Under the Act it is the federal EPA, not the States, which has responsibility for establishing the terms on which permits are to be initially issued and then made more stringent over time. *Id.* § 1342(a). If Congress intended pesticides to be subject to NPDES permits, as industrial waste materials are, it would not have directed that the analysis of pesticides be issued to the States.

The pesticide study provision also authorizes the Administrator of EPA to "conduct studies and investigations of methods to control the release of pesticides into the environment" and "submit reports . . . with his recommendations for any necessary legislation." *Id.* § 1254(*l*)(2). If pesticides were already slated for elimination under the NPDES program, such a provision would not be necessary. The language of this provision is consistent with what the legislative history makes plain: pesticides are discharged to the water primarily for beneficial purposes and hence are fundamentally different from industrial waste.

Within days after passing the CWA, Congress enacted major revisions to FIFRA, which explicitly regulates pesticides, and authorized them to be used where they will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(d)(1)(B). In other words, pesticides can and should be put to beneficial uses both on land and water but, as with all economic poisons, must be handled with care and judgment in order to prevent harm. In the context of addressing the Clean Water Act, Senator Dole made plain that, given the beneficial present and future uses of pesticides, they were to be regulated under

FIFRA: "[t]he use of pesticides and other agricultural chemicals will undoubtedly retain a high level of importance in agriculture for the foreseeable future. In the meantime efforts at both State and Federal levels are paying off in securing the registration [pursuant to FIFRA] and adherence to recommended usages." S. Rep. No. 92-414, at 92, *as reprinted in* 1972 U.S.C.C.A.N. at 3760.

Congress did not explicitly address the precise question at issue and identify pesticides discharged to the water as "pollutants" subject to permitting. Moreover, the Sixth Circuit's decision is inconsistent not only with the one section of the Clean Water Act explicitly directed to the regulation of pesticides, but also with the understanding of Congress that contemporaneously enacted FIFRA to address pesticide issues directly. In fact, the evidence in the statute and its legislative history clearly show that Congress did not consider pesticides to be classed as "pollutants."

The Sixth Circuit's analysis flies in the face of this Court's *in pari materia* canon, which dictates that statutes addressing the same subject matter generally should be read "'as if they were one law.'" *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972). The Sixth Circuit refused to consider the bearing of FIFRA on the question before it, declining to "analyze the relationship between the Clean Water Act and the FIFRA." CropLife Pet. App. 25a. Had it done so, it would have found that Congress recognized that a balance had to be struck between the benefits gained from careful use of pesticides on land and water and the risks of indiscriminate use of economic poisons. FIFRA sets out how that balance is to be struck; the Clean Water Act does not.

b. At the next level of generality, the question at issue may be phrased as whether a substance whose discharge to the water presents both benefits to human health and the environment, and certain risks, falls within the definition of "pollutant" under 33 U.S.C. § 1362(6). On this question, the Sixth Circuit reached an answer that is not found in the text of statute, and defies common sense. Nevertheless, the court found its reading to be supported unambiguously by the statute.

The decision below asserts that "[t]he term 'biological materials' cannot be read to exclude biological pesticides or their residuals." CropLife Pet. App. 19a. Presumably, the Court meant that "biological pesticides" are literally "biological materials." This, of course, is true. But by focusing only on the words in the definition of pollutant, 33 U.S.C. § 1362(6), and not on the term "pollutant" itself, the court below failed to follow this Court's instruction that the meaning of the defined term itself must be given some effect. *SWANCC*, 531 U.S. at 172; *Rapanos* v. *United States*, 547 U.S. 715, 734 (plurality opinion), 779 (Kennedy, J., concurring) (2006). This Court's instruction in *SWANCC* and *Rapanos* is particularly germane in this case. The Seventh Circuit, reversed by this Court in *SWANCC*, made the same error with respect to the provision of the Clean Water Act which defines "navigable waters," 33 U.S.C. § 1362(7), failing to give any weight to the term "navigable." The court below, however, has committed an error with more profound consequences. The *SWANCC* court merely gave deference to the Army Corps' decision to give no effect to the defined term; the court here has affirmatively prohibited EPA from giving any effect to the term

"pollutant," despite the deference that EPA is owed in this context.

The *Random House Webster's Unabridged Dictionary*, *supra*, at 1498, offers two definitions of pollutant: "1. something that pollutes.[2] 2. any substance . . . that renders the air, soil, water, or other natural resource harmful or unsuitable for a specific purpose." Both definitions connote a substance that is harmful or deleterious. Thus, to give the term "pollutant" effect, EPA properly provided that a pesticide is only a pollutant if it is not used according to the terms prescribed by FIFRA.

EPA's interpretation makes far more sense of the definition of pollutant. While some of the substances listed in 33 U.S.C. § 1362(6) are generally considered harmful, others would be harmful or beneficial depending on the circumstances. This is clearly the case with heat and biological materials. Thermal discharges are specifically recognized in the statute as being either beneficial or deleterious depending upon the circumstances. The statute authorizes EPA to conduct comprehensive studies regarding "minimizing adverse effects and maximizing beneficial effects of thermal discharges." 33 U.S.C. § 1254(t).

What is true for heat is true for biological materials as well. Many biological materials are plainly pollutants, and many are not. Congress surely did not intend, for instance, to require discharge permits for the introduction of hatchery-raised fish to navigable waters or to eliminate the introduction of such fish by 1985. In fact, other statutes promote the stocking of hatchery-raised fish for sport and

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[2] *Random House Webster's Unabridged Dictionary*'s first definition of "pollute," *supra*, at 1498, is "to make foul or unclean, esp. with harmful chemical or waste products."

recreation. 16 U.S.C. § 760 *et seq.* And, the CWA itself contains a provision directing the U.S. Fish and Wildlife Service, in cooperation with state agencies, to establish and implement a fisheries resource program for Lake Champlain, "including dedicating a level of hatchery production . . . at or above the level that existed immediately preceding the date of enactment." 33 U.S.C. § 1270 note. The most prominent example of the Act's focus on the elimination of substances *when they are harmful* is the national policy that the discharge of "toxic pollutants *in toxic amounts*" be prohibited. *Id.* § 1251(a)(3) (emphasis added). Congress clearly recognized that even "toxics" are truly pollutants only when they cause harm.

The answer to the question of how Congress addressed whether or not substances that may be beneficial or harmful, depending upon the circumstances, are to be classified makes perfect sense. When the substance is harmful, it is a pollutant; when it is beneficial, it is not. As we have shown, it is in FIFRA and not the Clean Water Act that Congress struck the balance that permits the beneficial use of pesticides but prohibits their harmful use.[3]

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[3] The primacy of FIFRA in governing the use of pesticides is reinforced by the terms of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, which Congress passed in 1980 and which governs the reporting and clean up of discharges of hazardous substances into the environment. Under CERCLA, Congress explicitly treated pesticides in a manner unlike any other hazardous substance. The statute requires reporting of "any release (other than a federally permitted release)" of a hazardous substance. *Id.* § 9603(a). But the section does not apply to the application of a pesticide product registered under FIFRA. *Id.* § 9603(e). The statute also imposes liability for

If the Sixth Circuit had framed the question at issue carefully, it would have found that, although the statute does not explicitly address whether pesticides are pollutants, it does recognize that "pollutants" are limited to harmful or deleterious substances.

Under *Chevron*, EPA's interpretation of the statutory scheme was both reasonable and fully consistent with the direction provided in the Clean Water Act, FIFRA, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The discharge of pesticides into the water for the beneficial purposes of preventing or remediating an infestation is not the discharge of a pollutant when it is done pursuant to FIFRA, the statute that directs EPA to set the parameters for the use of pesticides. The agency's interpretation was entitled to deference.

II. THE DECISION BELOW THREATENS THE NATION'S ABILITY TO PREVENT INFESTATIONS THAT ENDANGER THE PUBLIC WELFARE.

At a stroke, the Sixth Circuit's decision has made all pesticide applications to the waters of the United States illegal. Petitioners and their members rely on

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remedial costs resulting from the release of a hazardous substance. *Id.* § 9607(a). But it provides no recovery of such costs resulting from the application of a pesticide product registered under FIFRA. *Id.* § 9607(i). By dealing with pesticides under a provision that is separate from that addressed to "federally permitted releases," Congress made clear that pesticides were not regulated by permit programs such as that in the CWA but instead are regulated by the terms of FIFRA. This statutory exception to CERCLA is fully consistent with the treatment afforded pesticides in the EPA rule vacated by the Sixth Circuit in this case.

these applications to safeguard the nation's crops, forests, and housing stock from dangerous infestations. The Sixth Circuit's decision will put these vital resources in grave danger.

As EPA has stated, the decision will forbid "5.6 million pesticide applications annually . . . to control pests such as mosquitoes and gypsy moths, combat algae, weeds and other undesirable vegetation and attack invasive species such as zebra mussels." EPA Mot. for Stay at 11, CropLife Pet. App. 115a. The decision will prevent action by "local government entities that spray to and over waters to control mosquitoes, farmers who apply pesticides to eradicate aquatic pests, [and] foresters who aerially spray over waters to prevent outbreaks of timber pests." *Id.* at 1, 107a. The decision will make each such application of pesticide unlawful. *Id.* at 1–2, 106a–107a.

EPA has suggested that these dramatic adverse consequences may be mitigated by the development of general permits for application of pesticide to water, but such claims may be wishful thinking and at a minimum warrant healthy skepticism.

First, as EPA details, the process of developing and implementing a general permit is complicated, time-consuming, and unpredictable. EPA Mot. for Stay at 11–15, CropLife Pet. App. 115a–119a. This is by design—in implementing its statutory duty, EPA must seek and respond to input from States, other federal agencies, and the public at large. Both the process and the results may not afford pesticide applicators the certainty that they need. More fundamentally, it is unclear how EPA can possibly reconcile Congress's objective to eventually eliminate pollutants with the necessity of generally permitting pesticide application.

Second, under the Sixth Circuit's decision, EPA simply does not have the authority to authorize pesticide application in the vast majority of the country. As EPA acknowledges, a general permit "will provide permit coverage only in the four States in which EPA is the permitting authority, plus the United States' territories, tribal lands and federal facilities." EPA Mot. for Stay at 14–15, CropLife Pet. App. 118a. Thus, there is no easy fix for the problem created by the decision below. Even States that wish to follow suit may face additional procedural hurdles. And there is no certainty that States always have the appropriate incentives to address the pesticide application problem—pesticides prevent *national* outbreaks of disease and crop infestation that transcend state boundaries, which is why they are regulated nationally under FIFRA.

Finally, general permits do not account for the full flexibility that pesticide applicators require to combat infestations that suddenly threaten crops due to unanticipated confluences of aggravating factors. Take the example of aerial application businesses. Although there are approximately 1,600 such businesses in the United States, the average number of aircraft per business is only 2.2, and each such business typically has between three and five employees. These aerial applicators are often asked to make an application for mosquito abatement or for a crop just minutes before the application is needed—making it impossible to file CWA paperwork, including a notice of intent, in advance. And under general permits, the applicator could be required to do follow-up water monitoring to make sure the application had no negative effects. This requirement would force aerial applicators to trespass on private property, to which they have no legitimate access. In

contrast, such applicators are trained to handle pesticides in compliance with FIFRA, which strictly regulates such applications but does not require anticipating applications well in advance of their necessity and does not require follow up visits.

This simple example illustrates vividly the immediate and acute nature of the harms caused by the Sixth Circuit's decision. Similar examples abound. Thus, cranberry growers whose crop grows in the waters of the United States obviously will be directly harmed by this new regulatory regime that Congress never enacted. The bottom line point is straightforward, many livelihoods that are represented by the associations participating as *amici* in this case are now in serious jeopardy and only review by this Court can protect them.

In sum, the decision below threatens pesticide applicators with unpredictable and potentially fatal harm, and thus places our nation's forest, housing, and agricultural resources in danger.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS*
ANGUS MACBETH
JAMES W. COLEMAN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Amici Curiae

December 4, 2009 * Counsel of Record

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Nos. 09-533 and 09-547

IN THE
Supreme Court of the United States

CROPLIFE AMERICA, ET AL., PETITIONERS

v.

BAYKEEPER, ET AL.

AMERICAN FARM BUREAU FEDERATION, ET AL., PETITIONERS

v.

BAYKEEPER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* SUPPORTING PETITIONERS

DOUGLAS D. GEYSER
VINSON & ELKINS LLP
2801 Via Fortuna
Suite 100
Austin, TX 78746-7568
(512) 542-8400

THOMAS S. LEATHERBURY
Counsel of Record
VINSON & ELKINS LLP
Trammell Crow Center
2001 Ross Avenue
Suite 3700
Dallas, TX 75201-2975
(214) 220-7700

Counsel for Amici Curiae

December 4, 2009

QUESTION PRESENTED

Whether the Sixth Circuit erred in concluding that the "plain language" of the Clean Water Act unambiguously prohibits an Environmental Protection Agency ("EPA") rule that, consistent with more than 35 years of agency practice, provides that the application of a federally approved pesticide to or over water for its intended purpose and in accordance with the requirements of the EPA's pesticide regulatory program is not a "discharge of a pollutant."

TABLE OF CONTENTS

	Page
Interest of the *Amici Curiae*	1
Reasons for Granting the Petitions	3
A. The Sixth Circuit has substituted its deeply flawed reading of the Clean Water Act for that of the expert agency	4
B. The Sixth Circuit's decision will have grave practical consequences	14
C. Review is warranted now regardless of whether EPA plans to maintain the Rule	21
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Aluminum Co. of Am. v. *Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380 (1984)	13
Ass'n to Protect Hammersley, Eld, & Totten Inlets v. *Taylor Res., Inc.*, 299 F.3d 1007 (9th Cir. 2002)	11
Brown v. *Duchesne*, 60 U.S. (19 How.) 183 (1856)	7
Burlington Northern & Santa Fe Ry. v. *United States*, 129 S. Ct. 1870 (2009)	5, 23
Cardinal Chem. Co. v. *Morton Int'l, Inc.*, 508 U.S. 83 (1993)	23
Chevron, U.S.A., Inc. v. *Natural Resources Defense Council*, 467 U.S. 837 (1984)	4

Cases—Continued: Page

EEOC v. *Associated Dry Goods Corp.*, 449 U.S. 590 (1981) 14
Entergy v. *Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009) 13
Envtl. Integrity Project v. *EPA*, 425 F.3d 992 (D.C. Cir. 2005) 22
Exportal Ltda. v. *United States*, 902 F.2d 45 (D.C. Cir. 1990) 22
FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) 22
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 6, 7
FHA v. *Darlington, Inc.*, 358 U.S. 84 (1958) 12
Good Samaritan Hosp. v. *Shalala*, 508 U.S. 402 (1993) 12
Kokoszka v. *Belford*, 417 U.S. 642 (1974) 7
Lindahl v. *OPM*, 470 U.S. 768 (1985) 13
Molycorp, Inc. v. *EPA*, 197 F.3d 543 (D.C. Cir. 1999) 22
Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) 21
Nat'l Ass'n of Home Builders v. *Defenders of Wildlife*, 551 U.S. 644 (2007) 6
Nat'l Cable & Telecomms Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 21
No Spray Coalition v. *City of New York*, 252 F.3d 148 (2d Cir. 2001) 5
Radzanower v. *Touche Ross & Co.*, 426 U.S. 148 (1976) 9
Train v. *Colo. Pub. Interest Research Group, Inc.*, 426 U.S. 1 (1976) 9-10

Cases—Continued: Page

Udall v. *Tallman*, 380 U.S. 1 (1965) 13
United States v. *Rutherford*, 442 U.S. 544 (1979) 14
Whitman v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001) 9

Statutes and regulations:

Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 13
Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763 (2000) 13
Federal Insecticide, Fungicide, and Rodenticide Act, Pub. L. No. 80-104, 61 Stat. 163 (1947) ..... *passim*
Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 13
Water Resource Development Act of 1992, Pub. L. No. 102-580, 106 Stat. 4797 13
7 U.S.C. § 135(z)(2)(d) (1970) 8
7 U.S.C. § 135(z)(2)(g) (1970) 8
7 U.S.C. § 135a(a)(5) (1970) 8
7 U.S.C. § 135b(b) (1970) 8
7 U.S.C. §§ 136 *et seq.* 8
7 U.S.C. § 136a(c) 8
7 U.S.C. § 136a(c)(5) 5
7 U.S.C. § 136a(c)(5)(C) 4
7 U.S.C. § 136j(a)(2)(G) 8
33 U.S.C. § 1254(*l*) 6
33 U.S.C. § 1319(d) 18
33 U.S.C. § 1362(6) 4

Statutes and regulations—Continued: Page

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33 U.S.C. § 1365(d) 18

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40 C.F.R. § 19.4 (2008) 18
40 C.F.R. § 122.28(b)(2)(i) (2008) 15

Miscellaneous:

H.R. Rep. No. 92-911 (1972) 7
S. Rep. No. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668 6-7
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EPA, Office of Prevention, Pesticides, and Toxic Substances, Pesticide Regulation Notice 93-10 re: Effluent Discharge Labeling Statements (July 29, 1993) 12
EPA, Policy and Criteria Notice 2180.1 (1977) 12
EPA & U.S. Centers for Disease Control & Prevention, Joint Statement on Mosquito Control in the U.S. (Apr. 10, 2007) 19
Iowa Dep't of Natural Res., How to File a Complete Notice of Intent for NPDES General Permit (2007) 17

Miscellaneous—Continued: Page

Irrigation System Aquatic Weed Control National Pollutant Discharge Elimination System and State Waste Discharge General Permit (Feb. 20, 2008) 18
Nat'l Ass'n of State Dep'ts of Agric., NPDES Permits for Pesticide Applications Near Water (Sept. 28, 2009) 19
S.C. Dep't of Health and Envtl. Control Notice of Intent NPDES General Permit for Vehicle Wash Water Discharges SCG750000 (2002) 16
Washington State Governor's Office of Regulatory Assistance, Environmental Permit Handbook, NPDES Aquatic Pesticides General Permit 17
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BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* SUPPORTING PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

Amici are a bipartisan group of Members of Congress with a strong interest in the implementation

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief, in whole or part, and no counsel for a party or party made a monetary contribution to fund the preparation or submission of this brief. No entity or person, aside from the *amici curiae* and their counsel, made any monetary contribution for the preparation or submission of this brief. Counsel of record for the parties received timely notice of the intent to file this brief, and their letters consenting to the filing of this brief have been filed with the Clerk.

and interpretation of the Clean Water Act ("CWA") and the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). Senator James M. Inhofe is the Ranking Member, and Senators Christopher S. Bond and David Vitter are members, of the Senate Committee on Environment and Public Works. Representative John L. Mica is the Ranking Member, and Representative Howard Coble is a member, of the House Committee on Transportation and Infrastructure. Representative John Boozman is the Ranking Member on the Water Resources and Environment Subcommittee of the House Committee on Transportation and Infrastructure. These committees (and subcommittee) have jurisdiction over water pollution and other issues related to the CWA. Senators Mike Johanns and E. Benjamin Nelson are members of the Senate Committee on Agriculture, Nutrition and Forestry, which has jurisdiction over issues relating to FIFRA. Representative Frank D. Lucas is Ranking Member, and Representatives Dennis A. Cardoza, Travis W. Childers, K. Michael Conaway, Lincoln Davis, Larry Kissell, Blaine Luetkemeyer, Cynthia M. Lummis, Eric J.J. Massa, Mike McIntyre, Randy Neugebauer, David P. Roe, and Kurt Schrader are members, of the House Committee on Agriculture, which has jurisdiction over issues relating to FIFRA. Representatives Leonard L. Boswell, Sam Graves, and Betsy Markey are members of both the House Transportation and Infrastructure and Agriculture Committees. Representatives Marion Berry, F. Allen Boyd, Jr., Lincoln Davis, Jo Ann Emerson, Jack Kingston, and John T. Salazar are members of the House Committee on Appropriations, which has jurisdiction over matters relating to revenue and expenditures of all federal programs, including those under the CWA and FIFRA. Representatives Roy

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* Senators Blanche Lincoln and Saxby Chambliss, the Chairman and Ranking Member of the Senate Committee on Agriculture, Nutrition, and Forestry, also join this brief.

Blunt, Jeff Flake, Wally Herger, Lynn Jenkins, Walter B. Jones, Jr., Doug Lamborn, Sue Myrick, and Mike Ross represent districts with strong interests in agriculture, pesticide use, and pest control.

The Sixth Circuit's decision implicates important concerns involving environmental protection, public health, and economic growth. *Amici* have a strong interest in preserving the traditional understanding of the relationship between the CWA and FIFRA, which appropriately balances these objectives, and which was embodied in the Environmental Protection Agency ("EPA") rule invalidated by the Sixth Circuit. *Amici* also have an interest in preserving the role Congress originally created for the EPA under the CWA, which would allow the agency to bring its expertise to bear in interpreting and implementing its ambiguous terms. Finally, *amici* have a strong interest in protecting their constituents who apply pesticides in accordance with FIFRA from unreasonable legal liability, and in protecting their constituents from the many harms threatened by the Sixth Circuit's unreasonable restrictions on pesticide use.

REASONS FOR GRANTING THE PETITIONS

Since the CWA's enactment in 1972, the EPA has never required a National Pollutant Discharge Elimination System ("NPDES") permit for the application of FIFRA-registered pesticides to or over the waters of the United States. After notice and two rounds of public comment, the EPA formally promulgated a rule (the "EPA Rule"), 71 Fed. Reg. 68,483 (Nov. 27, 2006) (reproduced at Pet. App. 68a-111a[2]), that "codified what had been EPA's practice during the more than 35 years EPA has administered the

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[2] References to "Pet. App." are to the petitioners' appendix in *American Farm Bureau Federation v. Baykeeper*, No. 09-547.

Clean Water Act," EPA Mot. for Stay of Mandate at 9 (reproduced at Pet. App. 122a). For the reasons set forth below, the Sixth Circuit's holding that the CWA *unequivocally prohibits* the EPA Rule—and, by implication, that it *unequivocally mandates* treating FIFRA-registered pesticides used for their approved purpose as "waste," even when applied under conditions that EPA has found to be consistent with preventing "unreasonable adverse effects on the environment," 7 U.S.C. § 136a(c)(5)(C)—urgently warrants review.

A. The Sixth Circuit Has Substituted Its Deeply Flawed Reading Of The Clean Water Act For That Of The Expert Agency

Amici would not be filing this brief if this were a close case. This is not an instance where the court of appeals carefully analyzed an administrative rule under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and mistakenly, but reasonably, concluded that the rule was not entitled to deference. Indeed, the Sixth Circuit's reading is sufficiently unreasonable that it can be understood only as that court substituting its judgment for that of the expert agency charged with implementation of the statute, contrary to the clear intent of Congress.

1. *Meaning of "Chemical Waste."* The Sixth Circuit held that the CWA's term "chemical waste," 33 U.S.C. § 1362(6), unambiguously includes FIFRA-approved chemical pesticides that leave some residue after serving their "beneficial purpose," Pet. App. 19a, even where applied to control pests consistent with labeling EPA has found sufficient to prevent environmental harm, and even where the applicator is unaware of (and does not intend to dispose of) any residue. The court acknowledged that the term

"chemical waste" ordinarily means "discarded," "superfluous," or "refuse or excess" chemicals. *Id.* at 17a-18a. The court nonetheless concluded that although such pesticides are not "discarded" or "refuse" at the time of application, they are "waste" if residue remains after the pesticide has served its purpose. *Id.* Because "virtually all applications of chemical pesticides leave * * * residu[e]," under the Sixth Circuit's holding, "almost all applications of chemical pesticides to, over, or near waters will now require NPDES permits." Pet. App. 121a.

The conclusion that a beneficial product, which EPA itself carefully regulates under a detailed regime that explicitly considers effects on water quality and the environment, *see* 7 U.S.C. § 136a(c)(5), is "waste" *at the time it is used for its intended purpose*, is facially suspect. As the Second Circuit concluded, "pesticides are not being discarded when sprayed * * * with the design of effecting their intended purpose." *No Spray Coalition v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001) (per curiam). And, nearly four months *after* the Sixth Circuit's decision in this case, this Court concluded in *Burlington Northern & Santa Fe Ry. v. United States*, 129 S. Ct. 1870, 1880 (2009), that a company was not liable under the Comprehensive Environmental Response, Compensation, and Liability Act for "arrang[ing] the disposal" of a hazardous substance because it did not intend to "dispose" of the pesticide at the time some spilled during commercial distribution.

To reach its patently mistaken conclusion, the Sixth Circuit disregarded several bedrock principles of statutory construction.

a. First, the court plainly disregarded its obligation to consider the definition of "pollutant" in the context of the regulatory scheme. "In making the threshold determination under *Chevron*" whether a statute is ambiguous, "'a reviewing court should not confine itself to examining a particular statutory provision in isolation,'" but rather must interpret the provisions "'in context.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). Although the court gave lip service to the notion that the meaning of language must be determined in the context of the statute as a whole, Pet. App. 16a, it considered the words "chemical waste" in isolation. *See id.* at 17a-20a.

The court failed to consider what section 104(*l*) of the CWA, the sole provision that specifically refers to the effects of pesticides on water quality, indicates about whether using approved pesticides to control pests constitutes the sort of pollutant discharge that the CWA's National Pollutant Discharge Elimination System seeks to "eliminate." That provision does not classify pesticides as "pollutants"; rather, it requires studying "methods to control the release of pesticides into the environment [including] examination of the persistency of pesticides in the water environment," and calls for the President to report the results of that study to Congress together with "recommendations for any necessary legislation." 33 U.S.C. § 1254(*l*). That language does not suggest an intent to *eliminate* the application of pesticides to water. Indeed, the Act's legislative history indicates that "[t]he use of pesticides * * * will undoubtedly retain a high level of importance in agriculture for the foreseeable future" because "[p]esticides provide substan-

tial benefits to mankind by protecting plants and animals from pest losses." S. Rep. No. 92-414, at 92 (1971) (supplemental views of Sen. Dole), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3760. The legislative history suggests that residue from pesticides is to be addressed not through the NPDES system, but through the regulation of *nonpoint* sources. *See, e.g.*, H.R. Rep. No. 92-911, at 1275 (1972); *id.* at 1293-94 (stating that "[a]gricutural pollution control" concerns, among other things, "[p]esticides, fungicides, and herbicides," and that "[m]ost of the problems of agricultural pollution deal with * * * nonpoint sources"; noting that efforts under FIFRA "are paying off in securing registration and adherence to recommended usages"); *id.* at 1298.

b. Moreover, the Sixth Circuit failed to consider the meaning of "pollutant" and "chemical waste" in light of other federal regulatory efforts, particularly the system Congress specifically established decades before the CWA to regulate pesticide use, FIFRA. *See* Pub. L. No. 80-104, ch. 125, 61 Stat. 163 (1947). "When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) * * * .'" *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1856)). It is important to consider a provision in light of the entire regulatory structure, because "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Brown & Williamson*, 529 U.S. at 133. Although the Sixth Circuit noted the FIFRA regulatory scheme in passing at the beginning of its opinion, *see* Pet. App.

5a, it failed to consider its parallel regulatory scheme as relevant context in interpreting the CWA. That was error.

At the time that Congress took up the legislation that became the CWA, FIFRA required the registration of all pesticides that moved in interstate commerce and required all registered pesticides to bear a warning label bearing directions "adequate to prevent injury to living man and other vertebrate animals, vegetation, and useful invertebrate animals." 7 U.S.C. §§ 135(z)(2)(d) (1970), 135a(a)(5) (1970); *see also id.* § 135(z)(2)(g) (1970). As relevant here, FIFRA provided that the EPA Administrator would register a pesticide if "its labeling and other material required to be submitted" were sufficient, *id.* § 135b(b) (1970), to "prevent injury to * * * vertebrate animals * * * and useful invertebrate animals." *Id.* § 135(z)(2)(d).

Three days after enacting the CWA, Congress enacted comprehensive revisions to FIFRA. As amended, FIFRA continues to require that any pesticide sold in the United States must first be registered with the EPA. *See* 7 U.S.C. §§ 136 *et seq.* EPA may approve a pesticide only after it has made a detailed empirical assessment of its potential adverse environmental impacts, including specifically those "on aquatic resources (*e.g.*, fish, invertebrates, plants, and other species in fresh water, estuarine, and marine environments)," Pet. App. 93a, and the agency has imposed any restrictions on its use that are necessary to prevent "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c). The statute does not require users to seek government authorization before applying a registered pesticide. Rather, necessary restrictions are reproduced on the pesticide

label, and users must comply with those restrictions in applying the pesticide or risk liability. *See* 7 U.S.C. § 136j(a)(2)(G).

It seems extraordinarily unlikely that Congress intended, through the CWA's use of the general term "chemical waste," to sweep into the NPDES program the application of pesticides that were already subject to comprehensive regulation under legislation specifically governing pesticide use, even when applied subject to restrictions that EPA had found sufficient to prevent "unreasonable adverse effects on the environment." At a minimum, one would expect Congress to speak clearly before subjecting such conduct to an additional layer of regulation. "Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *cf. Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153-54 (1976) (absent "clear intention otherwise," "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum").

In this regard, the Sixth Circuit's conclusion conflicts with this Court's decision in *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976), which involved a neighboring term in the very same definition of "pollutant" at issue here. *See* 33 U.S.C. § 1362(6) (Supp. IV 1975). There, the court of appeals had held that the general term "radioactive materials" was "plain and unambiguous" in its sweep, and unequivocally encompassed "*all* radioactive materials," including source, byproduct, and special nuclear materials that had long been regulated under the Atomic Energy Act. Thus, it held that those nuclear materials were "pollutants" under the Federal

Water Pollution Control Act ("FWPCA"), as the CWA was then known. This Court reversed, holding that it was "abundantly clear" that Congress had not "intended the Act to encompass" those materials, reasoning that "[t]o have included these materials under the [Act] would have marked a significant alteration of the pervasive regulatory scheme embodied in the [Atomic Energy Act]." 426 U.S. at 23-24. Absent a "clear indication of legislative intent," the Court would not read the FWPCA's general language to have "significant[ly] alter[ed]" the regulatory landscape. *Id.* at 24. *Train* compels the conclusion that Congress did not, through the CWA's use of the general term "chemical waste," intend to substantially alter the regulatory regime by requiring users to obtain an NPDES permit before applying federally registered pesticides to or over water in accordance with their labels.

2. *Meaning of "Biological Materials."* The Sixth Circuit likewise erred in concluding that "'biological materials' cannot be read to exclude biological pesticides or their residuals," Pet. App. 21a, thus subjecting all biological pesticides to NPDES permitting, regardless of whether they leave residue after their use is complete. *Id.* at 121a. Under *Train*, the use of the general term "biological materials" is insufficient to indicate that Congress intended to sweep within the NPDES program pesticides that were already subject to exacting environmental regulation under FIFRA. *See* pp. 9-10, *supra*. It is evident from the face of the statute that the term is not meant to include "biological materials" of whatever kind, a reading that, as the EPA noted, "could arguably mean that activities such as fishing with bait would constitute the addition of a pollutant." Interim Statement and Guidance

on Application of Pesticides to Waters of the United States in Compliance with FIFRA, 68 Fed. Reg. 48,385, 48,388 (Aug. 13, 2003). The Ninth Circuit thus has concluded that the "the statute is ambiguous on whether 'biological materials' means *all* biological matter * * * or whether the term is limited to biological materials that are a waste product of some human process." *Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002).

While the term "materials" in the abstract is broader than "wastes," it is "unlikely that Congress intended to include biological pesticides * * * [as] pollutants, while chemical pesticides used in the same circumstances" would not be. Pet. App. 83a. The different language simply reflects the fact that biological pesticides were uncommon in 1972 and thus were not the focus of the definition. As EPA noted in promulgating the Rule, "[s]ince biologically and chemically based pesticides * * * are both EPA-evaluated products, treating them differently under the Clean Water Act is not warranted." *Id.* Moreover, because "biological pesticides in use today are generally reduced-risk products, * * * it would not make sense, and would be inconsistent with the goals of the Clean Water Act, to discourage the[ir] use * * *." *Id.*

3. The Sixth Circuit also failed to consider the expert agency's longstanding practice in determining the meaning of the words "chemical waste" or "biological materials." The very first words in the EPA's brief before the Sixth Circuit set forth the agency's long-held position:

> Since the enactment of the Clean Water Act in 1972, EPA has not required persons applying

> pesticides directly to or over waters of the United States for the purpose of controlling pests in or over those waters to obtain a Clean Water Act [NPDES] permit. This position reflected a general understanding that Congress did not intend to regulate under the Clean Water Act properly applied pesticides to control pests in or over waters when those pesticides had been approved by EPA for such use under [FIFRA] regulations.

EPA Br. at 3, *National Cotton Council of Am. v. EPA*, No. 06-4630; *accord* Pet. App. 73a (EPA Rule). Although the agency clearly apprised the Sixth Circuit of its contemporaneous and longstanding interpretation, the court did not so much as mention it in reaching its conclusion.[3]

An agency's contemporaneous and consistently maintained interpretation of a statute is "[o]f particular relevance" in construing its meaning, "which 'we have allowed . . . to carry the day against doubts that might exist from a reading of the bare words of a statute.'" *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993) (quoting *FHA v. Darlington,*

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[3] The court *did* note an agency statement that pesticides could not be "'discharge[d] into lakes, streams, ponds, or public waters unless in accordance with an NPDES permit.'" Pet. App. 6a (quoting EPA, Policy and Criteria Notice 2180.1 (1977)). That policy statement, however, involves *waste effluent* discharges that may contain a pesticide, not the application of pesticides to control pests. *See generally* EPA, Office of Prevention, Pesticides, and Toxic Substances, Pesticide Regulation Notice 93-10 re: Effluent Discharge Labeling Statements (July 29, 1993), *available at* http://www.epa.gov/PR_Notices/pr93-10.pdf. The quoted policy statement is consistent with the EPA Rule, which itself noted that a "pesticide may become a 'pollutant' at a later time (*e.g.*, after the pesticide product has served its intended purpose)." Pet. App. 87a.

Inc., 358 U.S. 84, 90 (1958)). Particularly where, as here, the agency was involved in developing the legislation in question, such a construction represents the considered view of those in the agency whom Congress "'charged with responsibility of setting its machinery in motion.'" *Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984) (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). "While not conclusive, it surely tends to show that the EPA's current practice is a reasonable and hence legitimate exercise of its discretion * * * that the agency has been proceeding in essentially this fashion for over 30 years." *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1509 (2009).

Moreover, it is significant that Congress has not seen fit to modify the statute during the intervening 37 years. "Congress is presumed to be aware of an administrative * * * interpretation of a statute," and "when it reenacts a statute without change," it is an indication that the agency has correctly determined Congress's intent. *Lindahl v. OPM*, 470 U.S. 768, 782 n.15 (1985). Since 1972, Congress has twice made major amendments to the NPDES program,[4] and on other occasions it has made minor changes to it.[5] But at no time has Congress seen fit to amend the statute to require EPA to control the application of pesticides through the NPDES program. Under

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[4] *See* Clean Water Act of 1977, Pub. L. No. 95-217, §§ 33(c), 54(c)(1), 65, 66, 91 Stat. 1566, 1577, 1591, 1599, 1600; Water Quality Act of 1987, Pub. L. No. 100-4, tit. IV, §§ 401-04(a), (c), (d), 405, 101 Stat. 7, 65-69.

[5] *See* Water Resource Development Act of 1992, Pub. L. No. 102-580, tit. III, § 364, 106 Stat. 4797, 4862; Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 1(a)(4), App. D, Div. B, tit. I, § 112, 114 Stat. 2763, 2763A-224 (2000).

this Court's precedents, that is a compelling indication that EPA has correctly interpreted Congress's intent. *See United States v. Rutherford*, 442 U.S. 544, 553-54 (1979) (holding that Congress's failure to overrule the FDA's decision not to make an exception for drug licensing for drugs used by the terminally ill reflects Congress's ratification of that position). "In the [37] years during which" the EPA has taken this consistent interpretation, "Congress has never expressed its disapproval, and its silence in this regard suggests its consent to the [EPA's] practice." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).

4. The most natural reading of the CWA, in light of all traditional tools of statutory construction, is the one embodied by the EPA Rule: the Clean Water Act's NPDES permit requirement does not encompass the application of FIFRA-registered pesticides to or over water in accordance with labeling restrictions. But at a minimum, it cannot be said that the opposite conclusion is *compelled* by the text of the statute.

B. The Sixth Circuit's Decision Will Have Grave Practical Consequences

1. Review is also warranted because of the breathtaking practical consequences the Sixth Circuit's decision will have. The EPA's analysis suggests that the Sixth Circuit's judgment likely will result in the *single greatest expansion* in the history of the NPDES program, resulting in approximately 5.6 million covered pesticide applications per year by 365,000 applicators. Pet. App. 124a. That figure is vastly greater than the current number of facilities authorized to discharge under individual permits (45,700), the number of facilities authorized for non-storm water

discharges under general permits (120,000), the number of industrial storm-water point sources (96,500), and even the number of storm water point sources associated with construction (250,000). Pet. App. 141a-142a. The current number of NPDES permittees is 411,470 facilities. *Id.* at 142a. Thus, in a single stroke, the Sixth Circuit's decision virtually *doubles* the number of entities subject to NPDES permitting.

It provides little comfort that the EPA "*believes it* can conform *its* conduct to comply with the [Sixth Circuit's] decision." EPA Response to Petition for Rehearing En Banc 2 (filed June 3, 2009) (emphasis added). Even assuming that the EPA's predictions about its ability to create a general permitting scheme are borne out, the EPA's compliance represents just a small fraction of the total cost of the Sixth Circuit's exorbitant mandate. *Forty-five* states, many of them already under severe budgetary pressure, face the daunting administrative task of developing and issuing general permits to implement the Sixth Circuit's decision.

2. The Sixth Circuit's decision also imposes tremendous burdens on pesticide users. It will increase by orders of magnitude the difficulty and cost for pesticide applicators to comply with the law. For small applicators, many of whom can ill afford expert environmental counsel, efforts at compliance will go from a simple matter of following instructions on a pesticide label to the vastly more complex process of identifying the relevant general permit, filing with the regulatory authority a valid notice of intent to comply with the general permit, *see* 40 C.F.R. § 122.28(b)(2)(i) (2008), and complying with all the permit's conditions and restrictions.

Completing a notice of intent alone can be complicated and time-consuming. While we understand that EPA has not yet finalized the requirements of general permits governing aquatic pesticide application, the following excerpts of general permit applications illustrate the often exacting requirements of notices of intent:

For the discharge described * * *, please provide concentrations of the following parameters ["Total Suspended Solids," "Oil and Grease," "pH (give high and low in range)," and "Surfactants"] and indicate whether the data is based on actual sampling results or, if estimated, a source of the estimated value. Data must be representative of the facility's current operation. The average daily value is typically based on an average of the last 365 days of data.[6]

- [Provide] [a] stormwater management program (SWMP), including best management practices (BMPs) that will be implemented and the measurable goals for each of the stormwater minimum control measures specified in Part V, Section B. [of this application], [and] the month and year in which the applicant will start and fully implement each of the minimum control measures or the frequency of the action * * *.[7]

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[6] S.C. Dep't of Health and Envtl. Control, Notice of Intent NPDES General Permit for Vehicle Wash Water Discharges SCG750000 at 2 (2002), *available at* http://www.scdhec.gov/administration/library/D-3756.pdf.

[7] Water Quality Div., Ariz. Dep't of Envtl. Quality, Arizona Pollutant Discharge Elimination System, General Permit for Discharge from Small Municipal Separate Storm Sewer Systems to Waters of the United States at 8 (2002), *available at*

- Provide an estimated start date the discharge did or is to commence, the name(s) of the receiving water(s), and check compliance conditions. *All applicable compliance conditions listed must be met for the Notice of Intent to be considered complete.*

  * * * *

  Provide the name(s) of the receiving water(s) to the first uniquely named river. Explain to where the storm water runoff will drain (e.g., unnamed waterway to road ditch to unnamed tributary to Mud Creek to Skunk River).[8]

The administrative burden of complying with general permits is illustrated by looking to general permits for aquatic pesticide use in the State of Washington, which began issuing such permits in 2002. *See* Pet. App. 4a. Washington has three general permits for pesticides involving aquatic plants and one for mosquito control. *See* Washington State Governor's Office of Regulatory Assistance, Environmental Permit Handbook, NPDES Aquatic Pesticides General Permit, *available at* http://apps.ecy.wa.gov/permithandbook/permitdetail.asp?id=99 (last visited Dec. 3, 2009). Applicators seeking to control aquatic plants must first determine which of three permit programs applies and then submit an application. The permits range in length from 22 to 71 pages with

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http://www.azdeq.gov/environ/water/permits/download/ms4small.pdf.

[8] Iowa Dep't of Natural Res., How to File a Complete Notice of Intent for NPDES General Permit at 2 (2007), *available at* http://www.iowadnr.gov/water/stormwater/forms/how_noi.pdf (emphasis added).

appendices. Even the permit most likely to apply to farmers (the irrigation system aquatic weed control permit, *see* Irrigation System Aquatic Weed Control National Pollutant Discharge Elimination System and State Waste Discharge General Permit (Feb. 20, 2008), *available at* http://www.ecy.wa.gov/programs/wq/pesticides/irrigation/permit-irrig_district-final.pdf) entails a significant administrative burden, imposing detailed monitoring requirements, *see id.* at 8-11, public notice requirements, *id.* at 12-13, and recordkeeping requirements, *id.* at 13-15, and requires submission of both an "Integrated Vegetation Management Plan" and a "spill control plan." *Id.* at 11.

3. In addition, even a general permit scheme presents a substantial risk of litigation and ruinous fines. Efforts at full compliance with the planned general permit scheme are bound to fall short in some respects "[g]iven that most applicators will not have ever been subject to an NPDES permit." Pet. App. 159a (decl. of James A. Hanlon, Dir., Office of Wastewater Management, Office of Water, EPA (Apr. 8, 2009)). Applicators face fines of up to $37,500 *per day per violation*, plus attorney's fees. *See* 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4 (2008); 33 U.S.C. § 1365(d). While the EPA may refrain from prosecuting the enormous class of newly minted NPDES permittees, there is every reason to believe that permittees' efforts at compliance will be subject to exacting scrutiny and perceived shortcomings will promptly become the subject of citizen suits. As the EPA noted below, in just weeks after the Sixth Circuit's decision, dozens of notices of intent to sue were filed involving mosquito spraying programs alone. Pet. App. 188a-189a. Those are likely the harbinger of many more lawsuits. Unless this Court acts, hundreds of thou-

sands of small applicators and "farmers will go into the next growing season under the threat of lawsuits." Nat'l Ass'n of State Dep'ts of Agric., NPDES Permits for Pesticide Applications Near Water (Sept. 28, 2009), *available at* http://www.nasda.org/File.aspx?id=24468.

4. The Sixth Circuit decision could have grave implications for public health. While not as time-consuming as individual permit systems, even a general permit scheme can result in significant delays, increased costs of compliance can divert resources from pest control, and litigation risks can deter and delay pest-control efforts. The combination could seriously undermine pest-control efforts that are critical to public health, particularly the control of mosquitoes. "[M]osquito-borne illnesses continue to pose significant risks to parts of the population in the United States." EPA & U.S. Centers for Disease Control & Prevention, Joint Statement on Mosquito Control in the U.S. (Apr. 10, 2007), *available at* http://www.epa.gov/pesticides/health/mosquitoes/mosquitojoint.htm. "Disease carrying mosquito species are found throughout the U.S.," *id.*, spreading West Nile virus, encephalitis, Dengue fever, and other serious diseases. Because pesticide use is an essential part of mosquito control efforts, if delays, increased expense, and litigation significantly curtail mosquito control efforts, the consequences could be deadly.

The Sixth Circuit's decision likewise could have serious effects on agriculture. The delays inherent in general permit schemes make them ill suited for many pest-control efforts, which require rapid responses to changing conditions.

> [P]est problems can develop quickly and require a prompt response. Failure to apply a pesticide

> soon after a pest is first detected could result in recurring and greater pest damage in subsequent years if a prolific insect were to become established in * * * plant hosts. Fungal spores such as soybean rust can move hundreds of miles in a few days' time via the wind * * *.

Pet. App. 167a (decl. of Teung F. Chin, Acting Director, Agricultural Research Service, Office of Pest Management Policy, U.S. Dep't of Agric. (Apr. 7, 2009)). Many family farmers and other small applicators lack the resources necessary to comply with a detailed permit scheme. Delays thus could cripple American farmers' emergency pest control efforts and impede their ability to respond quickly to new infestations. *Cf.* Pet. App. 164a-165a; *id.* at 203a (discussing individual permits). As Secretary of Agriculture Thomas J. Vilsack observed earlier this year, "a permitting system * * * is ill-suited to the demands of agricultural production." *Id.* at 203a.

5. Finally, the Sixth Circuit's deeply flawed decision may result in even more widespread liability because of its understanding of what constitutes the discharge of a pollutant *from* a point source. The Sixth Circuit concluded that excess pesticide and residue is waste from a "point source" although it was a useful product at the time it left the nozzle and only became waste later. Pet. App. 27a. The Sixth Circuit thereby concluded that something that would not ordinarily be deemed "waste" at the time and location of its release would nonetheless require a NPDES permit if it becomes "waste" at some point in the indeterminate future. That conclusion could have wide-ranging ramifications, and could lead to citizen suits seeking to require NPDES permits for tailpipe and smokestack emissions that may eventually enter

a water body as air deposition (although they are already subject to regulation under the Clean Air Act), for the dispensing of road salt, for the application of domestic fertilizers, and for the use of many other everyday products that have never before been subject to NPDES permitting. The Sixth Circuit's conclusion was a necessary step in its reasoning to support the judgment, and it is likely that litigants will use it in seeking to expand the scope of NPDES permitting into areas and activities not intended by Congress.

C. Review Is Warranted Now Regardless Of Whether EPA Plans To Maintain The Rule

Powerful institutional considerations favor review by this Court, regardless of whether the new Administration wishes to maintain the Rule. Given the tremendous practical importance of the Rule, review of the Sixth Circuit's deeply flawed decision is certainly warranted if the EPA wishes to retain it. But even if EPA may wish to depart from its longstanding practice, review is warranted so the agency can revisit its decision through traditional administrative procedures, without reliance on a transparently flawed circuit-court opinion. *See generally Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). The Sixth Circuit's holding that the terms "chemical waste" and "biological waste" are unambiguous has significantly curtailed the EPA's regulatory discretion with respect to an extraordinarily broad range of products. *See* Pet. App. 121a. Unless the Sixth Circuit's unreasonable construction of the CWA is vacated, its holding that those terms are "unambiguous" will have a distorting influence on any future rulemaking the EPA may wish to conduct in this area. *See, e.g., Nat'l Cable & Telecomms.*

Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("[a] court's prior judicial construction of a statute trumps an agency construction * * * if [it] holds that its construction follows from the unambiguous terms of the statute").

Even if the EPA favored the adoption of a general permit scheme for aquatic pesticides as a policy matter, such a significant change should be made through rulemaking, rather than the shortcut of relying on the Sixth Circuit's flawed decision. An agency is "require[d]" to "provide reasoned explanation for its action," *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009), and notice and comment rulemaking ensures "a measure of public accountability in[] administrative practices." *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990). It would ill serve interests in regulatory accountability to permit EPA regulations to be effectively amended without notice and comment by acquiescence in the Sixth Circuit's unreasonable construction of the statute. *Cf. Fox Television Stations*, 129 S. Ct. at 1811 ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."); *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 995 (D.C. Cir. 2005) (an agency cannot "'evade notice and comment requirements by amending a rule under the guise of reinterpreting it'") (quoting *Molycorp, Inc. v. EPA*, 197 F.3d 543, 546 (D.C. Cir. 1999)).

Finally, there is no warrant for denying certiorari to permit further development of the law in the courts of appeals. As noted above and in the petitions, Pet. 16-21, *CropLife America v. Baykeeper*, No. 09-533; Pet. 35-36, *American Farm Bureau Federation v. Baykeeper*, No. 09-547, the Sixth Circuit's de-

cision conflicts with decisions of this Court and other courts of appeals. Moreover, because challenges to the EPA's rule from eleven circuits were consolidated in the Sixth Circuit, *see* Pet. App. 8a, the decision below constitutes the sole judicial review that the EPA Rule will receive. As this Court has noted in the analogous context of courts of exclusive jurisdiction, under such circumstances, "the rule that [the court of appeals] applied in this case * * * is a matter of special importance to the entire Nation" warranting immediate review. *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 89 (1993).

CONCLUSION

For the reasons stated above, the petitions for a writ of certiorari should be granted. Alternatively, this Court should grant, vacate, and remand for further consideration in light of the intervening decision in *Burlington Northern*.

Respectfully submitted.

DOUGLAS D. GEYSER
VINSON & ELKINS LLP
2801 Via Fortuna
Suite 100
Austin, TX 78746-7568
(512) 542-8400

THOMAS S. LEATHERBURY
VINSON & ELKINS LLP
Trammell Crow Center
2001 Ross Avenue
Suite 3700
Dallas, TX 75201-2975
(214) 220-7700

Counsel for Amici Curiae

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Petitioners,

v.

BAYKEEPER, *et al.*
Respondents.

AMERICAN FARM BUREAU FEDERATION, *et al.*,
Petitioners,

v.

BAYKEEPER, *et al.*
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF VALENT BIOSCIENCES CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Of Counsel

ROBIN M. DEMOUTH
DUGAL S. SICKERT
VALENT BIOSCIENCES CORPORATION
870 Technology Way
Libertyville, IL 60048

LAWRENCE S. EBNER
Counsel of Record
JOHN D. CONNER, JR.
DANIEL E. JOHNSON
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, NW
Washington, D.C. 20006
(202) 496-7500

Attorneys for Amicus Curiae

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
REASONS FOR GRANTING THE PETITIONS	3
I. THIS CASE IS EXCEPTIONALLY IMPORTANT TO PUBLIC HEALTH AND THE PROTECTION OF FORESTS BECAUSE UNLESS THE SIXTH CIRCUIT'S DECISION IS REVERSED, THE AVAILABILITY AND EFFECTIVE USE OF STATE-OF-THE-ART, NATURALLY OCCURRING BIOLOGICAL PESTICIDES WILL BE SERIOUSLY CURTAILED, IF NOT COMPLETELY LOST	4
A. The Sixth Circuit's Decision Vacating EPA's Final Rule and Requiring NPDES Permits for Biological Pesticides Will Frustrate If Not Altogether Prevent Their Timely and Effective Use	5
B. *Bt* Larvicides Are Critical for Effective Mosquito Control	7
C. *Bt* Larvicides Also Are Important for Protecting Forests	9
D. EPA Has Recognized That Biological Pesticides Pose Lower Risks Than Most Conventional Pesticides	11
II. THE SIXTH CIRCUIT'S DECISION IS PREMISED IN PART ON FUNDAMENTAL ERRORS REGARDING BIOLOGICAL PESTICIDES	12

TABLE OF CONTENTS—Continued

	Page
A. Biopesticides Are Not "Biological Material" Pollutants Under the Clean Water Act	12
B. Biopesticides Do Not "Undeniably Alter the Physical Integrity of the Waters"	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES	Page
Association to Protect Hammersley, Eld, & Totten Inlets v. Taylor Resources, Inc., 299 F.3d 1007 (9th Cir. 2002)	16
Brown v. Gardner, 513 U.S. 115 (1994)	15
Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984)	14, 15
Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114 (2d Cir. 1994)	17
FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)	14
Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Attorney, 369 F.3d 960 (6th Cir. 2004)	13
Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007)	14
National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988)	17
United States Public Interest Research Group v. Atlantic Salmon of Maine, 215 F. Supp. 2d 239 (D. Me. 2002)	17
United States v. Frezzo Bros., 461 F. Supp. 266 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123 (3d Cir. 1979)	18
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TABLE OF AUTHORITIES—Continued

STATUTES	Page
7 U.S.C. § 136a(c)(5)(D)	11
33 U.S.C. § 1251(a)	2
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33 U.S.C. § 1362(19)	18

OTHER AUTHORITIES

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Page

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TABLE OF AUTHORITIES—Continued

Page

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North Carolina State University, Pesticide *Resistance Management, available at* http://ipm.ncsu.edu/apple/orchardguide/Resistance.pdf. 9

Russell S. Jones, *The Biochemical Classification Committee and the Classification of Biochemical Active Ingredients, available at* http://www.Pharmsolutions.com/doc5s/ClassificationBioChemicalActiveIngredients.htm.... 12

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INTEREST OF *AMICUS CURIAE* [1]

Valent BioSciences Corporation ("VBC") manufactures a unique class of FIFRA-registered pesticides known as "biological pesticides," which consist of naturally occurring microorganisms. They are applied to water to control mosquito larvae before they grow into adults capable of transmitting disease; to the canopy of forests to control caterpillars that defoliate and destroy trees; and also to agricultural crops.

Biological pesticides are environmentally beneficial and play an important role in integrated pest and mosquito management programs. Their application to or near water, including the application of a subspecies of the naturally occurring soil bacterium *Bacillus thuringiensis* ("*Bt*"), does not produce biological wastes. Nor do biological pesticides alter the chemical, physical or biological integrity of the waters of the United States. The World Health Organization has concluded that "*Bt* products are unlikely to pose any hazard to humans or other vertebrates or to the great majority of non-target invertebrates. . . ."[2]

---

[1] VBC states under Supreme Court Rule 37.6 that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than VBC and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Under Supreme Court Rule 37.2, on November 19 and 20, 2009, VBC provided counsel of record listed then on the Court docket with notice of its intention to file this brief. All of those parties have consented to the filing of the brief; their letters of consent are lodged with the Clerk.

[2] World Health Organization, *Bacillus Thuringiensis*, *Summary*, *available at* http://apps.who.int/bookorders/anglais/detart1.jsp?sesslan=1&codlan=1&codcol=16&codcch=217.

VBC devotes a substantial portion of its resources to the research and development, FIFRA registration, and commercialization of biological pesticides, including *Bt* larvicides. The industry that discovers and commercializes biological pesticides is comprised of many small or medium size businesses, such as VBC.

VBC respectfully submits that the Sixth Circuit's conclusion that a biological pesticide is always a Clean Water Act ("CWA") "pollutant" is wrong. *See* 33 U.S.C. § 1362(6). If allowed to stand, the lower court's decision will discourage, and in most cases prevent, the timely and effective use of biological pesticides, and also needlessly subject users of biological pesticides to CWA citizen suits. Losing the timely use of biological pesticides would be especially unfortunate because the CWA's goal is "to restore and maintain the chemical, physical and biological integrity" of waters, 33 U.S.C. § 1251(a), not to regulate as CWA pollutants environmentally beneficial biological pesticides, which help to protect public health and the natural environment.

VBC, which also submitted an *amicus curiae* brief below, is filing this brief in support of both certiorari petitions in order to urge the Court to review and correct the Sixth Circuit's decision, including specifically with respect to biological pesticides.

REASONS FOR GRANTING THE PETITIONS

Review should be granted in order to correct the lower court's erroneous holding that biological pesticides are CWA "pollutants." They are instead a unique and invaluable class of EPA-approved pesticides, comprised of naturally occurring microorganisms, including the soil bacterium *Bacillus thuringiensis* ("*Bt*"). *Bt* biological pesticides, also called *Bt* larvicides because they control insect larvae, are applied to water to control the larval form of the mosquito, an insect that causes more death and disease than any non-human animal. They also are applied to forests to control caterpillars that annually destroy millions of acres of trees. *Bt* larvicides not only are highly effective in controlling mosquito larvae and caterpillars, but also *benefit* the aquatic environment because they do not affect nontarget aquatic organisms. *Bt* biological pesticides provide significant net environmental, economic and public health benefits.

The CWA's illustrative "pollutant" example—"biological materials"—means biological *wastes*, not any and all material of a biological nature, such as *Bt* larvicides. And because they do not alter the integrity of the waters to which they are applied, *Bt* larvicides do not meet the CWA's definition of "pollution." Unless reversed, the Sixth Circuit's decision requiring compliance with time-consuming NPDES permit requirements will delay or prevent the timely and effective application of *Bt* biological pesticides to control disease-carrying mosquitoes and other target pests.

I. THIS CASE IS EXCEPTIONALLY IMPORTANT TO PUBLIC HEALTH AND THE PROTECTION OF FORESTS BECAUSE UNLESS THE SIXTH CIRCUIT'S DECISION IS REVERSED, THE AVAILABILITY AND EFFECTIVE USE OF STATE-OF-THE-ART, NATURALLY OCCURRING BIOLOGICAL PESTICIDES WILL BE SERIOUSLY CURTAILED, IF NOT COMPLETELY LOST

Bt biological pesticides benefit the environment while controlling insects. *Bt* larvicides are inherently less toxic to man and the environment than conventional chemical pesticides. In contrast with most conventional chemical pesticides, which may affect a large spectrum of organisms, including adversely affecting non-target organisms, *Bt* larvicides affect only the biology of the larva of a particular insect pest, and they decompose quickly in the water. Indeed, EPA has stated that "[e]xtensive testing shows that microbial [*i.e.*, biological] larvicides do not pose risks to wildlife, nontarget species, *or the environment*, when used according to label directions."[3] For these reasons, *Bt* biological pesticides provide significant net environmental, economic and social benefits. They protect public health. They also reduce forest defoliation and thereby maintain the capacity of forests to capture carbon and offset greenhouse gas emissions and control insects that jeopardize wildlife.

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[3] EPA, *Larvicides for Mosquito Control, available at* http://www.epa.gov/opp00001/health/mosquitoes/larvicides4mosquitoes.htm (hereinafter "EPA, *Larvicides for Mosquito Control*") (emphasis added).

The National Research Council, whose members are drawn from the Councils of the National Academy of Sciences, reported in 2000 that while conventional pesticides will continue to play an important role in pest control technology, there remains the need for pest controls that are consistent with ecologically-based pest management.[4] Biological pesticides are consistent with ecologically-based pest management. The Sixth Circuit's holding that biological pesticides are CWA "pollutants" will discourage their continued development and use. By subjecting these highly beneficial and time-sensitive products (which EPA has repeatedly determined are safer for the environment than conventional pesticides) to a lengthy permitting process, the Sixth Circuit decision will sharply curtail and reverse efforts to control harmful and life-threatening diseases and the adverse effects associated with deforestation.

A. The Sixth Circuit's Decision Vacating EPA's Final Rule and Requiring NPDES Permits for Biological Pesticides Will Frustrate If Not Altogether Prevent Their Timely and Effective Use

To initiate the process of complying with the lower court's decision, EPA, on October 7, 2009, released for comment draft conditions for applying pesticides under an National Pollutant Discharge Elimination System ("NPDES") pesticide general permit ("PGP").[5]

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[4] National Research Council, Committee on the Future Role of Pesticides in US Agriculture, *The Future Role of Pesticides in US Agriculture* (2000) at 251-52, *available at* http://books.nap.edu/openbook.php?record_id=9598&page=R1.

[5] EPA, *Clean Water Act Permitting of Discharges from Pesticide Applications* (Webinar) (Oct. 7, 2009), *available at* http://

In particular, under the draft conditions, applicators of all pesticides to or near water must hold, as of April 10, 2011, an individual NPDES permit or comply with the conditions of a PGP. The PGP will impose a myriad of conditions and restrictions on pesticide applicators, including the requirement to file a Notice of Intent ("NOI") before applying pesticides, technology and water quality-based effluent limits, and monitoring and reporting requirements. Governmental and private entities charged with controlling nuisance and disease-carrying mosquitoes face severe budgetary constraints in the current economy. They can ill afford the additional costs of complying with the conditions of PGP, especially when, in the case of biological pesticides, compliance will not bring any additional benefits to man or the environment.

The use of larvicides for mosquito control is widespread: they are applied to treat four million acres of water annually.[6] The application of *Bt* for larval control also is extremely time-sensitive. For mosquito control, *Bt* biological pesticides must be applied while the larvae are in their feeding stage and before they enter the pupae phase, a narrow and time critical window of several days. Moreover, mosquito larvae populations can increase as a result of unexpected rains and high tides.

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www.epa.gov/pesticides/ppdc/2009/october/session-1.pdf (hereinafter "EPA, *CWA Permitting of Discharges from Pesticide Applications*").

[6] EPA, NPDES Application Estimates and Information Sources (draft) (Sept. 23, 2009) *available at* http://www.epa.gov/pesticides/ppdc/2009/october/session1-npdes.pdf. (hereinafter "EPA NPDES Application Estimates").

The Sixth Circuit's decision will prevent the timely and effective application of *Bt* biological pesticides. EPA has stated that "[a] person filing an NOI would be covered starting 10 days *after* receipt of a complete and accurate NOI form by the appropriate permitting authority (provided the permitting authority does not delay authorization to further assess the NOI)."[7] Requiring applicators to wait ten days before using the *Bt* larvicides likely will force them to miss the critical larvae feeding stage. While pesticides may be applied in emergency situations before the submission of a NOI, the purpose of mosquito larviciding is to avoid an emergency. Because the Sixth Circuit decision will, as a practical matter, prevent the timely use of *Bt* larvicides, the decision will have a significant adverse impact on the use of these beneficial pest control products.

B. *Bt* Larvicides Are Critical for Effective Mosquito Control

The mosquito is a very efficient carrier of disease. It causes more human suffering and death than any non-human animal.[8] The mosquito transmits more than 100 pathogens that cause protozoan diseases such as malaria, filarial diseases such as heartworm, and viral diseases such as yellow fever, dengue fever, encephalitis, and West Nile virus. Each year there are 300 to 500 million cases of malaria reported worldwide, resulting in at least one million deaths

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[7] EPA, *CWA Permitting of Discharges from Pesticide Applications* (slide 45) (emphasis added).

[8] American Mosquito Control Association, *Mosquito-Borne Diseases, available at* http://www.mosquito.org/mosquito-information/mosquito-borne.aspx.

every year.[9] CDC already has reported 608 cases of mosquito-transmitted West Nile Virus, and 28 deaths, in 2009.[10]

All mosquitoes begin life in stagnant or standing water and develop through four stages of metamorphous: egg, larva, pupa, and adult. The female's eggs hatch within a day or two, releasing larvae that only live in water from four to fourteen days, after which they change to pupae before becoming adult mosquitoes that take flight. Public and private mosquito control programs practice Integrated Mosquito Management, which seeks to control mosquitoes by reducing aquatic breeding sites for the larvae. When monitoring and surveillance programs confirm the need to control mosquito larvae with pesticides, the FIFRA-registered choices include biological pesticides such as *Bt* larvicides, biochemical pesticides such as methoprene (an insect growth regulator), and conventional organophosphate chemical insecticides.[11] Unlike the more limited and precise application of larvicides, the control of adult mosquitoes requires the ground and aerial spraying of conventional organophosphate chemical pesticides over much larger areas.[12]

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[9] Centers for Disease Control and Prevention, *The Impact of Malaria, A Leading Cause of Death Worldwide, available at* http://www.cdc.gov/malaria/index.htm.

[10] Centers for Disease Control and Prevention, *West Nile Virus, Statistics, Surveillance, and Control, available at* http://www.cdc.gov/ncidod/dvbid/westnile/surv&controlCaseCount09_detailed.htm#MeningitisEnc.

[11] American Mosquito Control Association, *Control, available at* http://www.mosquito.org/mosquito-information/control.aspx.

[12] EPA, *Larvicides for Mosquito Control* ("Killing mosquito larvae before they emerge as adults can reduce or eliminate the

The most widely used biological pesticide applied to water to control mosquito larvae are two subspecies of *Bt*: *Bacillus thuringiensis israelensis* ("*Bti*") and *Bacillus sphaericus* ("*B. sphaericus*"). Mosquito larvae consume the dormant *Bt* bacterium spores and an associated *Bt* toxin that binds to receptor cells in the mosquito larva's gut, thereby causing the larva to starve. These receptor cells are not present in fish or mammals. *Bti* and *B. sphaericus* therefore benefit the environment because they control only the mosquito larvae and do not affect other nontarget aquatic organisms.[13] *Bt* biological pesticides serve as an important tool in managing the mosquito's development of resistance to traditional chemical larvicides and adulticides.[14]

C. *Bt* Larvicides Also Are Important for Protecting Forests

EPA's Final Rule, 71 Fed. Reg. 68,483 (Nov. 27, 2006), cited, as an example of pesticides that are applied "near" water, insecticides that are applied aerially to the forest canopy to control foliage-feeding caterpillars where waters of the United States may be present below the canopy. Pet. App. 7a. In 2008, the Gypsy Moth alone defoliated 1,593,649 acres of trees in the northeastern United States.[15] There are

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need for ground or aerial application of pesticides to kill adult mosquitoes.").

[13] *Id.*

[14] North Carolina State University, *Pesticide Resistance Management, available at* http://ipm.ncsu.edu/apple/orchardguide/Resistance.pdf.

[15] USDA, Forest Service, *Northeastern Area, Gypsy Moth Digest—Defoliation, available at* http://na.fs.fed.us/fhp/gm/defoliation/index.shtm.

2.7 million acres of forests that are treated every year to control caterpillars.[16] The Sixth Circuit's decision will also preclude the timely and effective use of these biological pesticides to control caterpillars that kill trees. Preserving forests through the application of biological pesticides contributes to clean water because forests serve to filter pollutants.[17]

Commercial formulations of *Bacillus thuringiensis* subspecies ***kurstaki*** (***"Btk"***) have been used to control forest caterpillar pests since the mid-1970's. More than a million pounds of ***Btk*** are applied annually in the United States to control the destructive gypsy moth. A total of 2,743,816 acres were treated with ***Btk*** formulations between 1995 and 2002.[18] As with other subspecies of ***Bt***, ***Btk*** is considered "friendly" to humans and the environment. It controls only susceptible caterpillars by the mechanism described above. "U.S. EPA (1998) classifies ***Btk*** as virtually non-toxic to fish, based on an assessment of several acute toxicity studies in trout and one study in bluegills."[19]

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[16] EPA NPDES Application Estimates.

[17] CNN, *Study: Saving Forests Best Way To Cheap, Clean Water, available at* http://www.cnn.com/2003/TECH/science/09/03/forests.water.reut/index.html.

[18] USDA, Forest Service, *Control/Eradication Agents for the Gypsy Moth Human Health and Ecological Risk Assessment for Bacillus thuringiensis var. kurstaki (B.t.k.), available at* http://www.fs.fed.us/foresthealth/pesticide/pdfs/060804_btk.pdf.

[19] *Id.* at 4-8.

D. EPA Has Recognized That Biological Pesticides Pose Lower Risks Than Most Conventional Pesticides

EPA is responsible for registration of the following categories of pesticides under FIFRA: conventional (chemical) pesticides, biological pesticides (or microbials or biopesticides), biochemical pesticides, plant-incorporated protectants (plants that genetically produce their own pesticides), and antimicrobial pesticides (*e.g.*, disinfectants). *See* 72 Fed. Reg. 60,988, 60,989 (Oct. 26, 2007). The Agency has stated that "[t]hese pesticides, although regulated under the same statutory standards under FIFRA and FFDCA, pose different levels of risk and exposure. . . ." *Id.*

Because they consist of naturally occurring microorganisms, EPA has stated that "[b]iopesticides are usually inherently less toxic than conventional pesticides."[20] The Agency requires all pesticide applicants to submit toxicology and environmental studies, which the Agency reviews to determine whether a pesticide meets FIFRA's "no unreasonable adverse effects on the environment" standard for registration. *See* 7 U.S.C. § 136a(c)(5)(D). But because biological pesticides are inherently less toxic than conventional pesticides, EPA requires applicants for biological pesticide registrations to submit much less data than applicants seeking to register conventional pesticides. *Compare* 40 C.F.R. §§ 158.1—158.1410 (data requirements for conventional pesticides) *with* 40 C.F.R. §§ 158.2100—158.2174 (data requirements for microbial pesticides).

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[20] EPA, *What Are Biopesticides?*, *available at* http://www.epa.gov/pesticides/biopesticides/whatarebiopesticides.htm. (hereinafter "EPA, *What are Biopesticides?*").

In 1995, EPA created the Biopesticides and Pollution Prevention Division to bring "safer pesticides products into the market place and to encourage the adoption of these safer, reduced risk products and related integrated pest management (IPM) practices."[21] EPA Guidelines for expedited review of conventional and biological pesticides explain that "EPA believes that biological pesticides generally pose less risk than most conventional pesticides."[22]

The Sixth Circuit's decision would require all users of these beneficial and efficacious biological pesticides to submit to the time-consuming NPDES permitting process, which will hamper, if not largely prevent, the use of these products to control disease and deforestation.

II. THE SIXTH CIRCUIT'S DECISION IS PREMISED IN PART ON FUNDAMENTAL ERRORS REGARDING BIOLOGICAL PESTICIDES

A. Biopesticides Are Not "Biological Material" Pollutants Under the Clean Water Act

Biological pesticides are not CWA pollutants because they are not biological *wastes*. The Sixth Circuit's decision that biological pesticides, which benefit public health and the environment, are CWA pollutants because they may superficially "fit into the ordinary meaning of 'biological materials,'" Pet. App.

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[21] Russell S. Jones, *The Biochemical Classification Committee and the Classification of Biochemical Active Ingredients, available at* http://www.pharmsolutions.com/docs/ClassificationBioChemicalActiveIngredients.htm.

[22] EPA, Pesticide Registration Notice 97-3 at XI(B), *available at* http://epa.gov/PR_Notices/pr97-3.html.

19a, is wrong. That conclusion produces absurd results and is at odds with basic principles of statutory construction and established case law holding that "biological materials" means biological *wastes*.

The Sixth Circuit cited no legislative history remotely suggesting that when Congress passed the CWA in 1972, it intended that any and all "matter of a biological nature" introduced into the waters of the United States would constitute the prohibited discharge of a pollutant. Pet. App. 21a. If that were true, then Congress intended that the state game warden who stocks the local trout stream in the Spring with "artificial concentrations" of young trout, or the fisherman who casts upon the waters the sacrificial worm, must first obtain a NPDES permit. Under the Sixth Circuit's decision, both the trout and the worm would squarely qualify as "biological materials" within the "ordinary, contemporary, [and] common meaning" of the term, thus requiring an NPDES permit. *See id.* at 20a-21a, citing *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Attorney*, 369 F.3d 960, 967 (6th Cir. 2004).

"Biological materials" as used in the CWA definition of "pollutants," however, means biological *wastes*. *Bt* larvicides are not biological wastes. They are applied to or near waters of the United States to protect the environment, public health and natural forestry resources. After serving their intended beneficial purpose they do *not* leave a residue or waste in the waters because they consist of naturally occurring bacteria.[23]

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[23] EPA Pesticides Glossary, *available at* http://www.epa.gov/pesticides/glossary/#b (hereinafter "EPA Pesticides Glossary").

The "precise question at issue" is whether, when Congress enacted the CWA in 1972, it clearly intended that a "biological pesticide" applied to water to control a pest was a prohibited "pollutant." *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 837-38 (1984). The Sixth Circuit committed clear error when, instead of ascertaining "whether Congress has directly spoken to the precise question at issue," it quoted two dictionary definitions of "material" and summarily declared that the "plain, unambiguous nature of" biological materials compels the conclusion that biological pesticides are CWA pollutants. Pet. App 20a-21a. *Chevron* requires more.

A court must assess the clarity or lack of clarity of statutory language by employing all of the traditional tools of statutory construction. *Chevron*, 467 U.S. at 843, n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). Thus, the clarity or ambiguity of the statutory term "biological materials" must not be assessed in a vacuum, or merely by reference to general dictionary definitions, but instead must be assessed within the context of whether Congress intended "biological materials" to encompass beneficial biological pesticides. *See generally Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) ("[T]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. . . . It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000)) (internal

quotation marks omitted); *Zuni Pub. School Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 98 (2007) (statutory "[a]mbiguity is a creature not [just] of definitional possibilities but [also] of statutory context.") (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

The context of the CWA demonstrates that Congress did not intend "biological materials" to include biological pesticides. EPA did not register the first *aquatic Bt* biological larvicide, *Bti*, for the control of mosquito larvae until 1983. It did not register the second *Bt* mosquito larvicide, *B. sphaericus*, until 1991.[24] As EPA's Final Rule noted, "[t]he fact that more biological pesticides have been developed since passage of the [Clean Water] Act in 1972 does not justify expanding the reach of the NPDES permit requirement when there is no evidence that Congress intended the CWA to regulate biological pesticides in a manner different from chemical pesticides." Final Rule, 71 Fed. Reg. at 68,486. Because Congress could not have directly addressed whether "biological materials" includes "biological pesticides," the Sixth Circuit should have afforded *Chevron* deference to EPA's Final Rule, which concluded that "it would not make sense, and would be inconsistent with the goals of the Clean Water Act, to discourage the use of biological pesticides by requiring applicators of these products to obtain an NPDES permit when chemical pesticides have no such requirement." *Id.* at 68,486-87.

Ironically, to bolster its conclusion that "biological materials" includes biological pesticides, the Sixth Circuit looked at an EPA definition of the term "biological pesticides." Pet. App. 22a-23a. The Sixth

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[24] EPA, *Larvicides for Mosquito Control*.

Circuit, however, materially misstated EPA's definition. According to the Sixth Circuit, EPA defines "biological pesticides" to include "other biological materials." *Id.* In fact, the EPA definition of "biological pesticides" does *not* include "other biological materials," but only "certain microorganisms, including bacteria, fungi, viruses, and protozoa that are effective in controlling target pests."[25]

The Sixth Circuit also erred when it assumed that biological pesticides are wastes. *Bt* biological pesticides are not wastes: they leave no residue in the water after serving their intended purpose of controlling mosquito larva.[26] Courts treat "biological materials" as pollutants only if they are biological wastes.

In each of the "biological materials" cases cited by the Sixth Circuit, the court specifically found that human activity generated a biological waste. For example, in *Association to Protect Hammersley, Eld, & Totten Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002), the Ninth Circuit found the CWA to be "ambiguous on whether 'biological materials' means *all* biological matter regardless of quantum and nature." The court held that mussel shells, mussel feces, and other biological materials emitted from mussel-harvesting facilities were not "biological materials" because "the shells and natural byproduct of living mussels released . . . are the result of the natural biological processes of the mussels, *not the waste product of* a transforming human process." *Id.* at 1017 (emphasis added). Applying the doctrine of *ejusdem generis*, the court found that the "more specific items in the illustrative

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[25] EPA Pesticides Glossary.

[26] *Id.*

list of pollutants . . . support an understanding of the more general statutory term, 'biological materials,' as *waste* material of a human or industrial process." *Id.* at 1016 (emphasis added).

In the second case cited by the Sixth Circuit, *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), the court found that fish *remains* discharged from a hydroelectric facility are pollutants since they are "biological materials." That the biological materials—dead fish and fish parts—remain in the water after the human activity attests to their characterization as "biological materials" *wastes*. In the third case, relied upon but not analyzed by the Sixth Circuit, *United States Public Interest Research Group v. Atlantic Salmon of Maine*, 215 F. Supp. 2d 239 (D. Me. 2002), the district court went no further than to hold that non-North American salmon that escape from an aquaculture facility are "biological materials" because the fish do not occur naturally in that water and that salmon feces and urine that escape the facility's nets are either "biological materials" or "agricultural wastes." *Id.* at 247-49. Animal feces and urine are biological materials, but more importantly they are wastes—the useless byproducts of metabolism.

Other courts have confirmed that biological materials means biological wastes. *See, e.g., Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 117 (2d Cir. 1994) (liquid manure spread on farm fields met definition of pollutant as it was "solid waste, . . . sewage, . . . biological materials, . . . and agricultural waste discharged into water"); *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 645 (2d Cir. 1993), *cert. denied*, 512 U.S. 1245 (1994) (discarded vials of human blood are "biological mate-

rials"); *United States v. Frezzo Bros.*, 461 F. Supp. 266, 269-70 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123 (3d Cir. 1979) (runoff from pile of "mushroom compost" was discharge of "sewage" and "biological materials").

EPA's Final Rule relied upon and cited most of these cases for the Agency's well supported conclusion that "[i]n cases in which courts have found specific biological materials to be 'pollutants' under section 502(6) the substances at issue were waste materials discharged from a point source." 71 Fed. Reg. at 68,487. The Sixth Circuit found a conventional pesticide to be a "chemical waste" only if it leaves an excess portion in the water "after performing its intended purpose." Pet. App. 18a. For this reason, a *Bt* bacterium is a biological waste only when it too leaves an excess portion in the water after performing its intended purpose. But because they are naturally occurring, *Bt* bacterium do not leave an excess portion in the water after performing their intended purpose. Therefore, *Bt* larvicides are not pollutants under the Clean Water Act.

B. Biopesticides Do Not "Undeniably Alter the Physical Integrity of the Waters"

After mistakenly concluding that biological pesticides are CWA "pollutants" because they fit within the ordinary meaning of "biological materials," the Sixth Circuit then mistakenly concluded that a biological pesticide must meet the CWA's definition of "pollution," 33 U.S.C. § 1362(19), because, when added to water, they "undeniably alter its biological integrity." Pet. App. 23a. There is no evidence even remotely suggesting, however, that the addition of naturally occurring *Bt* biological pesticides alters the biological integrity of the waters of the United States.

Instead, EPA has concluded that biological pesticides do not alter the water integrity. The Agency defines "biological integrity" of water as "the capability of supporting and maintaining a balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of the natural habitat of the region."[27] The application of *Bti* and *B. sphaericus* to aquatic environments to control mosquito larvae, as well as the application of *Btk* near water to control caterpillars that defoliate trees, meet EPA's criteria for preserving the water's biological integrity. Because they are naturally occurring, they degrade quickly.[28] EPA has expressly stated that "[e]xtensive testing shows that microbial larvicides *do not pose risks to wildlife, nontarget species, or the environment*, when used according to label directions."[29] Similarly, EPA has classified *Btk* as nontoxic to fish and aquatic invertebrate. Because EPA has determined that biological pesticides do not pose risks to nontarget aquatic species, the Sixth Circuit erred when it concluded that it is "undeniable" that biological pesticides alter the biological integrity of waters of the United States.

The Sixth Circuit incorrectly concluded that the CWA's definitions of "pollutant" and "pollution" are unambiguous and include biological pesticides. In so doing, the court unnecessarily subjected users of beneficial biological pesticides to a costly and time-

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[27] EPA, *Biological Integrity*, *available at* http://www.epa.gov/bioiweb1/html/biointeg.html.

[28] EPA, *What are Biopesticides?* ("Biopesticides . . . often decompose quickly . . .").

[29] EPA, *Larvicides for Mosquito Control*. (Emphasis added.)

consuming NPDES permitting process that will hinder the timely use of these products for important public health and environmental uses.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel

ROBIN M. DEMOUTH
DUGAL S. SICKERT
VALENT BIOSCIENCES CORPORATION
870 Technology Way
Libertyville, IL 60048

LAWRENCE S. EBNER
Counsel of Record
JOHN D. CONNER, JR.
DANIEL E. JOHNSON
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, NW
Washington, D.C. 20006
(202) 496-7500

Attorneys for Amicus Curiae

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